Supreme Court of the United States

No. 73-978

LOUIS H. BLAIR, Mayor of Falls Church, Va.,
DAVID MONTAGUE, Mayor of Hampton, Va.,
J.W. HORNSBY, JR., Mayor of Newport News, Va.
etc., *et al.*,

Petitioners,

v.

GLORIA JOSEPH, JAMES ROBERT HOGGE,
t/a MISS MASSEUSE, t/a BO-JAC, LTD. etc., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

GEO. S. LEONARD, ESQ.,
THOMAS E. GLASCOCK, ESQ.,
P.A. YEAPANIS, ESQ.,

Attorneys for Petitioning Officials of the Named Cities.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable, the Chief Justice
and the Associate Justices of this Court:

The three named Virginia cities, by their officials, join as parties in a single petition under Rules 23(5) and 46 and respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit which affirmed one District Court's exercise of federal injunctive jurisdiction to prevent enforcement of the massage parlor ordinances of the City of Falls Church,

and reversed another District Court's refusal to exercise such jurisdiction over similar statutes adopted by the cities of Hampton and Newport News.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported in 482 F.2d 575 (1973). Its opinion denying rehearing has not been officially reported. Both are included in the appendix at pages 56a and 68a. The full opinions of the two District Courts granting and denying injunctive relief are not officially reported, however, the first memorandum of Judge Merhige is reported in 353 F. Supp. 367 (1973). All are printed in the appendix at pp. 35a (Civ. A. No. 595-72-R, Richmond, Merhige, J.) and 1a, 17a (Civ. A. Nos. 42-72-NN, 48-72-NN, Newport News, Kellam, J.). The appendix also contains the prior rulings of this Court (34a) and the Supreme Court of Virginia (19a) in *Kisley v. City of Falls Church*, and court clerk certificates showing pendency of two state court actions.

JURISDICTION

On July 26, 1975, the Court of Appeals affirmed the issuance of a preliminary injunction against further enforcement of the Falls Church massage parlor ordinances and reversed the dismissals of complaints against the cities of Hampton and Newport News (56a). Rehearing was denied September 27, 1973 (68a).

The jurisdiction of this Court arises under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a summary ruling by this Court dismissing an appeal from the highest court of a State "for want of a substantial federal question" should be read by other state and federal courts as a holding on the merit or lack of merit of the federal constitutional claims presented.

2. Whether the rule of *Younger v. Harris,* 401 U.S. 36 (1971) and its progeny in the absence of any showing of bad faith enforcement or harrassment requires a federal court to abstain from exercising jurisdiction over the same issues of the facial unconstitutionality of local massage parlor ordinances which were pending in multiple civil and criminal state actions when the federal complaints were filed.

STATEMENT OF THE CASE

Petitioners are the Mayors, City Council members and/or chief law enforcement officers of the Cities of Falls Church, Hampton and Newport News, Virginia, and include the officials responsible for the enforcement of ordinances affecting the licensing and operation of local massage parlors. Respondents are the operators of six massage parlors in those cities and some of their present and former employee-masseuses.

The cities join in a single petition because of the common issues involved. Each of the cities in the exercise of its police power has limited the massaging by one sex of the other when done as a business, to premises normally used for physical therapy or to medically directed occasions. See, *e.g.*, the ordinance of the City of Falls Church at 26a.

Each city has been or is a party to state court civil and/or criminal suits involving these ordinances in which some one or more of these respondents has raised the various constitutional challenges made in the underlying federal court actions and one or more such state suits had been or were pending as to each city, including one or more duplicate parties plaintiff, when the respective federal court complaints were filed.

In each of the three federal cases, the District Courts relied on or distinguished the holdings of the Supreme Court of Virginia, and of this Court in *Kisley v. Falls Church*, ——U.S.___, 93 S.Ct. 237, and has applied or rejected the doctrine formulated in this Court's holding in *Younger v. Harris, supra*, and subsequent derivative decisions.

Finally, the three federal cases were combined after separate argument in a single opinion by the Court of Appeals from which review by certiorari is now petitioned.

Prior and Pending Litigation

1. Falls Church, Virginia

The massage parlor ordinances were adopted on March 22, 1971. Two days later Robert Kisley, operator of two massage parlors located in that City, filed an action against the City in the Virginia Circuit Court in Fairfax County to enjoin enforcement on the ground that the ordinances were constitutionally invalid on their face as an arbitrary classification by sex, and constituted a denial of due process and equal protection. A denial of the injunction was affirmed on appeal by the Supreme Court of Virginia in *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168, Mar. 1972 (19a) on the ground that the

ordinances were within the legitimate police powers of the city and not in contravention of Federal or State constitutions. A limitation to medical ownership of massage facilities was held invalid and severed. Factually, the Court found that in Kisley's massage parlors all patrons were male and employees female and that on the record it was admitted that the massage there given included "every part of the body."

From that ruling Kisley appealed to this Court (No. 72-189), which on October 16, 1972, *per curiam* entered the following order (26a):

> "The appeal is dismissed for want of a substantial federal question."

On November 16, 1972, Kisley was arrested and on December 7, 1972, he was convicted in the Falls Church Municipal Court for violations of Ordinance No. 512 subsequent to this Court's ruling. Under Virginia law he appealed for a trial *de novo* before the Circuit Court of Fairfax County which is competent to consider the constitutional issues and from which further appeals will lie to the Supreme Court of Virginia and to this Court. That appeal was pending at the time of his filing the federal complaint in the District Court and remains pending today.

On November 14, 1972, Kisley again filed an equity complaint against the City in the same state Circuit Court (Chanc. No. 38021) reasserting claims of sex discrimination, arbitrary classification and lack of due process and again praying an injunction against the enforcement action of the City. The injunction was denied and this case is still awaiting trial on the merits in that Court (55a). From any decision thereon Kisley will have a right of appeal to both the Supreme Court of Virginia and to this Court.

On December 8, 1972, following his conviction and shortly after the injunction against enforcement prayed in his second state equity suit was denied, Kisley joined with two Norfolk massage parlor operators and a former Norfolk masseuse in filing a federal complaint in the Eastern District of Virginia, at Richmond. This suit realleged the same constitutional infirmities of the Falls Church and Norfolk statutues and asked for the same injunctive relief against further enforcement by the cities. An *ex parte* temporary restraining order prohibiting further state enforcement was issued and extended by the District Court (Merhige, J.). In January, 1973, this was converted to a preliminary injunction (35a). This order was modified on the following day (51a):

> "to enjoin only future, not presently pending, enforcement of any municipal ordinance which prohibits bisexual physical massage."

The modified order also dismissed Kisley individually as a plaintiff on grounds of *res judicata* based on this Court's decision, but directed retention of jurisdiction on substitution of a different Falls Church massage parlor operator and two additional masseuse employees as plaintiffs complaining of the facial unconstitutionality of the Falls Church ordinances. With this shift of parties the District Court held that the City's defense of prior adjudication of the validity of the ordinances by this Court was no longer applicable. From that decision the Falls Church officials appealed to the Fourth Circuit (Appeal No. 73-1131).

Further proceedings in the state courts have been suspended pending determination by this or other federal courts.

2. Hampton, Virginia

The Massage Parlor Ordinances were adopted on March 22, 1972. On that date, the City Council was served with a Notice of Application For Injunction which was filed by the respondent, James Hogge, operator of the Hampton Massage Parlor "Miss Masseuse" (BO-JAC, LTD) in an equity action (Chanc. No. 10801) in the Virginia Circuit Court of the City of Hampton praying preliminary and permanent injunctions against the enforcement of the massage parlor ordinances. The petition alleged the facial unconstitutionality of these ordinances on basically the same grounds stated by Kisley in the Falls Church case, *i.e.*, " . . . rights guaranteed us by the Constitution of Virginia, the Constitution of the United States of America and the 1964 Federal Civil Rights Act." The State Court denied a preliminary injunction by order entered March 20, 1972 (12a). From this denial, Hogge appealed to Mr. Justice I'Anson of the Supreme Court of Virginia for a preliminary injunction and on March 29, 1972, that application was also denied (3a).

Hogge took no appeal to this court. Instead, on May 4, 1972, he filed a complaint in equity for the same injunctive relief on the same constitutional grounds before the United States District Court for the Eastern District of Virginia, sitting in Newport News (CA 42-72-NN). On July 24, 1972, District Judge Kellam denied the injunction and dismissed the complaint, ruling that the District Court was not a court of review over the decision of the Virginia Supreme Court in *Kisley v. Falls Church, supra,* and that the prior institution of a state action which permitted appeal through the state courts to this Court and the stated prosecutive intent of the city called for federal abstention under this Court's holdings in *Younger v. Harris,*

supra, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and related decisions (1a).

Hogge appealed from this holding to the Fourth Circuit (Appeal No. 72-2441).

3. Newport News, Virginia

The ordinance regulating the performance of massage in commercial non-medical facilities (Chap. 21C) was adopted on March 27, 1972.

Edwin Emerson, trading as the "Peninsula Massage Parlor" and the "Continental Massage Parlor", a respondent in this action, was arrested by Newport News authorities on April 14, 1972, for violation of this law, was tried and convicted in the Municipal Court, appealed and was retried and convicted in the Hustings Court on August 17, 1972. No further appeal was taken.

Earle Phillips operator of the "French Massage Parlor" in Newport News, a respondent in this action was arrested April 29, 1972, for violation of this ordinance, pleaded guilty and was fined $250. For further offense he was again arrested on June 30, 1972, convicted in Municipal Court on July 20, 1972, appealed, was retried in the Hustings Court and convicted on December 7, 1972. No further appeal therefrom was taken.

On April 26, while Emerson's prosecution was pending in the State court, he joined with Phillips[1] and with a dismissed masseuse, Scarlett Anne Hilliard, in filing an

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[1] Phillips, as operator of the "Paradise Massage Parlor" in Hampton, also joined with Hogge as plaintiff in the latter's federal complaint to prevent enforcement of the Hampton ordinances.

equity complaint with the United States District Court in Newport News, also before Judge Kellam (Civ. No. 48-72-NN), attacking the constitutional validity of the Newport News ordinances on the same grounds advanced by Hogge in Hampton and Kisley in Falls Church. Emerson prayed declaratory and injunctive relief against further enforcement by the City.

In Emerson's District Court action, Judge Kellam reached the same result for the same reasons as in the case of Hogge and Phillips against Hampton, denying the prayer for an injunction against further enforcement of the ordinances and dismissing the complaint (17a). This dismissal was then appealed by Emerson to the Fourth Circuit Court of Appeals (Appeal No. 72-2442).

The Decision of the Fourth Circuit

In a July 26, 1973, decision which combined the three appeals of the officials of Falls Church from the ruling of Judge Merhige, and of Hogge, Phillips and Emerson from the rulings of Judge Kellam, the Court of Appeals sustained the issuance of a preliminary injunction against further Falls Church enforcement of its ordinances, reversed Judge Kellam's abstention from jurisdiction over the officials of Hampton and Newport News (62a) and suggested to the latter Court reconsideration on remand of its prior denial of preliminary injunctions (66a).

The Court of Appeals overruled the claim of prior adjudication of the facial constitutionality of the Falls Church ordinances by this Court, holding instead that the substantial constitutional questions raised by the complaints were not foreclosed by this Court's dismissal of the appeal in *Kisley v. City of Falls Church, supra,* since the

stated ground "want of a substantial federal question" either meant that this Court had not considered the merits of the federal questions, or, if it did, then its consideration was not conclusive since some of these federal claims "were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court" – giving as an example the claims made under Title VII (employment discrimination) of the 1964 Civil Rights Act (66a).

On the argument of the cities for federal court abstention because of the civil and criminal proceedings pending when the complaints were filed in the District Courts, the Circuit agreed with Judge Merhige that his substitution of parties after dropping Kisley distinguished this Court's decision, in *Younger v. Harris, supra.* Regarding Judge Kellam's contrary ruling in the Hampton and Newport News cases it was held:

> "that *Younger* does not apply when there is neither criminal nor civil litigation pending in a state court in which questions sought to be raised in federal litigation by the same parties or those in privity with them are present." (62a).

The three cases were then remanded to the respective district courts for trial on the merits.

The three cities moved for a rehearing in banc pointing to the pending civil and criminal Kisley state actions, the privity of interest between Kisley and other Falls Church massage parlor operators, the criminal prosecution of the plaintiff Emerson and the institution of a state injunction action by Hogge, both of which were pending when the federal complaints were filed and when the appeal was

heard. The cities noted that the facial constitutionality of these ordinances were challenged in the state suits. The cities pointed out that the Circuit Court was in error on the facts in assuming that the Hampton state action by Hogge had been dismissed (12a) and equally so in assuming that the criminal action pending against Emerson in Newport News at the time the District Court complaint was filed did not concern a plaintiff in the federal action.

The motion for rehearing was denied September 27, 1973, with opinion (68a) on the ground that:

> "There are no proceedings in the Virginia courts, civil or criminal, involving the plaintiffs before us on appeal which, we think, would warrant invoking the *Younger* doctrine. . ." (70a).

and specifically noted on the Kisley criminal proceedings:

> "his sentencing has been postponed pending an adjudication in the instant proceedings of the validity of the ordinance under which he was prosecuted" (71a).

As to Kisley's pending state injunction suit the Circuit held it did not affect their decision since Kisley would be entitled as a matter of absolute right to an order of nonsuit (71a).[2]

In denying rehearing the Circuit stated further that while it now appeared that there had been a state equity action pending by Hogge (BO-JAC), the Hampton reliance on the

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[2] Your petitioners believe this to be an incorrect statement of Virginia law once a responsive pleading has been filed, if the defendant can show prejudice, as by the defense of duplicate actions, *Kemper v. Calhoun*, 111 Va. 428, 69 S.E. 358, see Sweeny, *Nonsuit in Virginia* 52 Va. L.R. 751, 756 (1966). Cf. Rule 41(a) F.R.C.P.

Younger doctrine was first made in the petition for rehearing and came too late (71a). Although the pendency of the state case had been a principal factor in Judge Kellam's decision in the District Court (3a) and also appeared in the appeal brief, the Circuit felt that Hampton's lack of emphasis on the point during oral argument made reconsideration unnecessary (71a, n. 1).

Post-Appeal Action

Following the Circuit reversal of Judge Kellam and its denial of a rehearing, Hogge moved for and, over the objection of the City, was granted a non-suit in his state court equity action against Hampton.

Similarly, on October 15, 1973, Emerson was permitted after remand to withdraw as plaintiff in the federal suit against Newport News, leaving Phillips and Hilliard as continuing plaintiffs.

On reconsideration after remand of the prayer for injunction in the Newport News and Hampton cases, Judge Kellam denied such relief for a second time, saying:

> "It is therefore clear that when this Court issued its opinion in July 1972, the State court actions seeking injunction and declaratory relief were pending in the State Court."

Sentencing in the *Kisley* criminal appeal in Fairfax has been suspended pending determination in this case. A motion to dismiss his equity state suit was filed but has not been noticed by his counsel for hearing, and the case remains pending (55a).

REASONS FOR GRANTING WRIT

I

Whether Summary Affirmances by This Court are Decisions Involving the Merits is a Question of Immediate and Exceptional Judicial Importance Affecting Future Decisions of all Lower Federal and State Courts.

The Court of Appeals held that it was not required to accept your dismissal of the Kisley appeal from the judgment of the Virginia Supreme Court for want of a substantial federal question, as being a ruling on the merits of the issues involved (66a) – arguing that the effect of your ruling was left in doubt by the decisions of other circuits.

> The contention which requires some discussion is that the dismissal by the Supreme Court of the United States for want of a substantial federal question in the initial litigation instituted by Kisley is *res judicata* of the validity of the ordinances. The meaning of a dismissal for want of a substantial federal question has been debated, with conflicting conclusions, within the circuits. Compare *Dillenberg v. Kramer*, 469 F.2d 1222, 1225 (9 Cir. 1972) with *Doe v. Hodgson* [478 F.2d 537 (2 Cir. 1973)]; and *United States ex rel. Epton v. Nenna*, 446 F.2d 363, 366 (2 Cir.), *cert. den.*, 404 U.S. 948 (1971).

The precedential effect to be given by state and federal courts to this Court's summary determinations is clearly an extraordinarily important question both in terms of judicial administration and consistency of adjudication in lower courts and one which should be heard and determined at this time. Starting with the fact that this Court has plenary power over such appeals (28 U.S.C. §2106) and its rulings have equal precedential value whether the question arose from the state or federal courts (28 U.S.C. §2104), it seems clear that the significance of the dismissal of an appeal for want of a substantial federal question would materially affect the subsequent jurisprudence of all court systems in the nation.

Such rulings constitute a numerically major proportion of the appeal dispositions by this Court.

> And the ambiguity that necessarily attaches to the orders of the Court summarily disposing of 87% of the appeals that come to it from state courts creates problems for lower courts and makes unnecessary work for the Court itself in the future as litigants, uncertain of the significance of a summary disposition, seek clarification by bringing to the Court other cases raising the same point."
>
> [*Report of the Study Group on the Caseload of the Supreme Court 38* (Washington, D.C. 1972)]

Stern and Gressman report that 78 percent of all appeals are so disposed of, *Supreme Court Practice* §4.28 (3d Ed. 1962). On the immediate question they further state that in the 1959 term 25 state court appeals were

dismissed for lack of a substantial federal question (*Stern and Gressman* at 195, n. 41).

The controlling significance of your summary rulings is not limited to the federal system. Testing the validity of local legislation against the criteria of the federal constitution is a judicial function which is regularly exercised by the state courts, subject only to the review powers of this Court, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963), *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657 (1947). The finality of their consideration in the absence of further review by this Court has been many times confirmed, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 604 (1927).

> "State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can relitigate federal claims which have been presented to and decided by state courts."
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> *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325 (5 Cir.), *cert. den.*, 389 U.S. 975 (1967).

This has equally been the rule of decision in the Fourth Circuit, *Patterson v. City of Newport News*, 364 F.2d 816 (4 Cir. 1966), *appeal dismissed* and *cert. den.*, 385 U.S. 650, *reh. den.*, 386 U.S. 96 (1967).

Since such dispositions by the highest state courts become the applicable rule of federal law for all lower courts in each state system, it seems clear that the weight to be given to this Court's dismissals of state court appeals is as critical in the states as in the federal

courts. Yet it does not appear to have been previously settled by any decision of your bench.

a. Except for the Ruling Below, There is no Significant Departure in Any Circuit from the Rule that the Dismissal of an Appeal by this Court for Want of a Substantial Federal Question Constitutes a Determination of the Merits of the Issues Involved.

The quotation given above from the Fourth Circuit opinion states that the meaning of a dismissal for want of a substantial federal question "has been debated, with conflicting results, within the Circuits." Your petitioners say this conclusion is in error. Search has produced no other Circuit opinion which has denied or even debated the general rule, *United States ex rel. Epton v. Nenno, supra, United States ex rel. Fein v. Deegan,* 410 F.2d 13 (2 Cir.), *cert. den.*, 395 U.S. 935 (1969); *Heaney v. Allen,* 425 F.2d 869 (2 Cir. 1970); *Port Authority Bondholders Protective Comm. v. Port of New York Authority,* 387 F.2d 259 (2 Cir. 1967); *Hall v. Thornton,* 445 F.2d 834 (4 Cir. 1971).

This is equally the opinion of the legal authors. Pointing to the fact that the presence of a substantial federal question is a jurisdictional issue on any appeal, (*e.g.*, Rule 15(e)), Robertson and Kirkham in **The Jurisdiction of the Supreme Court of the United States** §54 (1st Ed. 1936), note that such a dismissal must necessarily be a ruling on the merits since it holds that jurisdiction is lacking in that the federal questions involved are either frivolous or are foreclosed by earlier precedent.

Stern and Gressman agree:

> "The court is, however, deciding a case on the merits when it dismisses for want of a *substantial* question, or affirms summarily" *op. cit. supra* at 164 (emphasis in text).

They concur with Robertson that such a ruling constitutes an affirmation of the federal constitutional decision of the state court (§5.18). If we approach the question from the point of view of the jurisdictional history of this Court, we reach the same conclusion, Ulman and Spears, *Dismissed for Want of a Substantial Federal Question*, 20 **Bost. U.L. Rev.** 501, 516 (1940):

> "That the decision in *Milheim v. Moffat Tunnel District* did not represent an attempt by the Court to restrict the application of dismissals 'for want of a substantial federal question' is indicated by other decisions of about that time. In 1922, the Court in *Zucht v. King* dismissed an appeal the issues in which had been clearly settled by previous decisions. The dismissal was of the Court's own motion. The case is an example of the Court of its own initiative rigidly applying tests of merit before assuming jurisdiction. It is the decision most frequently cited in modern dismissals for want of a substantial federal question, and it appears in the rules of the Court.

The contrary argument by the Court below in support of its holding is said to be based on the three cited cases, *Doe v. Hodgson, Dillenberg v. Kramer* and *Epton v. Nenna.*

The first two named, as the Court of Appeals noted, were summary *affirmances* made by this Court without further statement. In *Doe* it was held that this action had to be read as an affirmation on the merits:

> For now, however, we continue to believe that we are bound by the Supreme Court's summary affirmances 'until such time as the Court informs us that we are not.' [478 F. 2d at 539].

Concededly, the *Dillenberg* decision questions the significance of a summary affirmance but held the problem did not have to be resolved in the context of its fact situation.

Turning to the third case cited, *United States ex rel. Epton v. Nenna*, we have a case directly in point, a holding by District and Circuit courts that a dismissal for want of a substantial federal question by this Court is a final determination on the merits of the constitutionality of the statute in question.

In short, the assertion by the Court below of a "conflict between the Circuits", exists at best as a presumed analogy drawn by the court below from a rhetorical question in *Dillenberg* on a different form of ruling.

A further inquiry would have also shown the existence of occasional scholarly debate about the continued vitality of this Rule but two courts have declined to involve themselves in speculation as to the possibly negative effect of this Court's workload on the degree of review given in summary dispositions: the District Court in *United States ex rel. Epton v. Nenna, supra*, 318 F.Supp. 906, n. 8, and the *Port of New York Authority* case, 387 F.2d at 262-63, n. 3; *Heaney v. Allen, infra.*

Finally, it must be said that one federal District Court has held directly to the contrary of the general rule on the theory that this Court would change its mind on the occasion of its next review. By coincidence the case arose in a situation which is on all fours with the present facts. The original case had tested the constitutional validity of the massage parlor statutes of the City of Dallas in the Texas courts against the same attack as was made here by Kisley. The Texas court held the ordinances to be a valid exercise of municipal police power to regulate such parlors, *Patterson v. City of Dallas,* 355 S.W. 2d 838 (Tex. Civ. App. 1962). An appeal was taken to this Court which dismissed it – also for want of a substantial federal question, *Patterson v. City of Dallas,* 372 U.S. 251, 83 S.Ct. 873 (1963).

Thereafter, the same challenges to the Dallas ordinances were raised by different parties plaintiff in a federal district court action. Judge Hill granted an injunction against City enforcement, *Corey v. City of Dallas,* 352 F. Supp. 977 (N.D. Tex. 1972) holding that this Court's *Patterson* ruling was not controlling on the constitutionality of the ordinances since a "basic right" was involved and this Court had, since *Patterson,* changed to a "compelling government interest" standard which would result in a different outcome if the question were raised again.[3]

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[3] It is understood that argument on the appeal in *Corey* was to have been heard by the Fifth Circuit on November 12, 1973.

Your petitioners contend that the Court below was in error in holding that a conflict of Circuits existed and say to the contrary that every judicial authority other than the *Corey* District Court opinion holds that summary dismissal of a state court appeal for want of a substantial federal question constitutes a final holding on the lack of merit in the federal grounds raised by the appeal.

b. The Dismissal by this Court of Kisley's Prior Appeal for Want of a Substantial Federal Question Determined all Federal Issues Raised before the Fourth Circuit.

The Court below considered its earlier decision in *Hall v. Thornton*, 445 F.2d 834 (4 Cir. 1971) in which it had held:

> Where the Supreme Court has previously determined that a case does not present a federal question of substance, a three judge court is not required to be convened, and a single district judge may dismiss the petition. *Ex parte Poresky*, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152.

The Court of Appeals conceded that Hall was to the contrary of its reading of the significance this Court's holding in *Kisley*. It distinguished your *Kisley* ruling by creating a "substantial consideration" of issues exception to the normal effect of your summary actions:

> We conclude, however, that even if our decision in *Hall* commits us generally to treat summary dismissal for want of a substantial federal question as an adjudication on the merits, we should not treat the Supreme

> Court's dismissal in *Kisley* as an adjudication on the merits. This is so because an examination of the opinion of the Supreme Court of Virginia and the representations of the parties made to us in their briefs and arguments show that at least some of the federal claims sought to be litigated in the instant case were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court. We therefore think that there was good reason for the Supreme Court to dismiss for want of a substantial federal question on the familiar principle that it will not consider questions neither raised nor considered throughout the litigation, and that this dismissal does not constitute an adjudication of plaintiffs' claims, *inter alia*, that the ordinances are repugnant to Title VII of the Civil Rights Act of 1964. (65a - 66a)

Your petitioners argue that neither the law nor the facts support the distinction so made and that the judicial adoption of a 'substantial consideration' exception to the significance of your *per curiam* holdings would emasculate the existing rule, would lend itself to endless debate about the 'substantiality' of oral or written argument, and could jeopardize the future applicability of the doctrines of *stare decisis* and *res judicata*.

1. The Court of Appeals was wrong in law. It is a hornbook principle that a judgment determines not only the questions directly raised but also those which could have been raised in the proceedings, *Grubb v. Pub. Utilities Comm. of Ohio*, 281 U.S. 470, 50 S.Ct. 374 (1930). The District Court in dismissing Kisley as a plaintiff against the

City of Falls Church spelled the rule out plainly,

> "More importantly, Kisley could have raised every argument and theory upon which he now relies. The doctrine of, and policy behind, *res judicata* dictates that a party not be allowed voluntarily to litigate a claim and then, upon its unsuccessful conclusion, to relitigate the same on a new legal theory, [citing cases]" (41a)

That additional theories and statutory references may have been added to the later federal suit would not change the effect of the ruling of the Virginia Supreme Court and this Court.

> "The Civil Rights Act affords a remedy defined by federal statute and redressable in the federal courts. But where, as here, the same facts have been the subject of state actions and final judgments have been entered there, the principle of *res judicata* applies.
>
> * * *
>
> "He cannot now reinstitute the same cause against the same defendants, based on the same facts, by merely changing his legal theory and crossing from the state to the federal courthouse."
>
> [*Johnson v. Dept. of Water and Power of the City of Los Angeles*, 450 F.2d 294 (9 Cir. 1971), *cert. den.*, 405 U.S. 1072 (1972)]

2. Moreover, the exception made by the Court of Appeals was in error on the record, both with respect to the issues and to the parties.

Kisley alleged the facial invalidity of the Falls Church massage parlor ordinances on federal and state constitutional grounds in the state courts of Virginia. In his Jurisdictional Statement filed with this Court, Kisley described the issues considered by the Virginia Supreme Court:

> "On the 26th day of March, 1972, the Supreme Court of Virginia, by Justice Lawrence W. I'Anson affirmed the decision of the Circuit Court of Fairfax County. The Court found that the Ordinances in question did not deprive appellants of their property rights without due process of law, and that the ordinances did not deny appellants and their employees equal protection of the law. The Court also found that the classifications found within the ordinances distinguishing between massage parlors on the one hand, and beauty parlors and barber shops on the other, is not an unreasonable or discriminatory classification. Finally, the Court found the Falls Church Municipal Ordinances were not preempted by any State legislation. It is from this holding of the Supreme Court of Virginia that this appeal is taken." (p. 4-5).

and the "Questions Presented" to this Court were then stated to be

> "1. Are the Falls Church Municipal Ordinances No. 510 and No. 512 void under the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that they arbitrarily interfere with appellant's legitimate occupation, therefore constituting an unreasonable exercise of police power premised on sex discrimination."

> "2. Do Falls Church Municipal Ordinances No. 510 and No. 512 make an arbitrary distinction between certain persons or classes of persons" (p. 2-3).

In his Jurisdictional Statement Kisley also presented arguments to this Court claiming discrimination under the Civil Rights Act of 1964 (p. 9)[4], equal employment opportunity discrimination (p. 6), sex discrimination (pp. 8-9) and even anticipated the future ratification of the Equal Rights Amendment to the United States Constitution (p. 9).

Identically, his complaint as filed in the District Court, shows the same arguments on the equal protection and due process clauses of the Fourteenth Amendment (pars. 13, 14), the Civil Rights Act of 1964 (par. 15), and the Equal Employment Opportunities Act (par. 2).

True, the federal complaint has added references to the Civil Rights Act of 1871 (par. 18) and Ninth Amendment rights of privacy "of consenting adults" (par. 16). These represent no substantive change and were in any event open for assertion and determination in the former action.

The issues in the former and present actions are therefore identical and the validity of Ordinance No. 512 of the City of Falls Church – and any similar classification

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[4] This particular claim was also that given by the Court below as its illustration of a new theory justifying retention of federal jurisdiction, quotation *supra*. Nothing in the record suggests either an effect on interstate commerce or employment of the fifteen person minimum (42 USC §2000-e(b)(g)(h)).

and regulation in Hampton or Newport News – was a matter previously and authoritatively determined under both federal and state constitutional and statutory law. It having once been held proper for a municipality to regulate its massage parlors by ordinances forbidding commercial non-medical massaging of one sex by the other, repetition of these federal issues was thereafter foreclosed and the later Kisley federal complaint should have been dismissed in the same manner as was done in Hampton and Newport News by Judge Kellam, *Coogan v. Cinn. Bar Assn.*, 431 F.2d 1209 (6 Cir. 1970), *Murray v. Oswald*, 333 F.Supp. 490 (SDNY 1971).

Similarly, if the point is regarded as being of legal significance here, the federal parties in interest are in contemplation of law the same as in the former *Kisley* suit. The City officials replace the City itself as defendants. The plaintiffs are again principally Virginia massage parlor operators. Judge Merhige held that the dismissal of Kisley on grounds of *res judicata* and his replacement as plaintiff by another Falls Church massage parlor left the federal court free to proceed to again pass on the same ordinances for the same purpose of preventing the cities from enforcing them, since he saw the case as now having different parties from the prior litigation (42a).

Had the federal complaint been a challenge to the constitutionality of the Falls Church ordinances as applied to any specific plaintiff, the ruling would possibly be correct since each such case stands on its own facts. But the *Kisley* challenge was to the validity of the ordinances on their *face*, and therefore a final judgment that their enforcement would raise no substantial federal question was *stare decisis* as to subsequent litigation on the same point regardless of whether the same or different parties were involved, *Rooker*

v. Fidelity Trust Co., 263 U.S. 413, (1923), or even if – as Hogge did here – the plaintiff had abandoned the state courts before review was complete, in order to file his federal complaint, *Tang v. Appellate Div. of the New York Supreme Court*, ___F.2d ___, 42 L.W. 2245, (2 Cir. Oct. 19, 1973). Where totally different parties were involved, it was said in *Heaney v. Allen*, 425 F.2d 869, 870-71 (2 Cir. 1970).

> Here the foreclosure comes in the plainest way. This very statute was before the Supreme Court on appeal from a unanimous decision by the highest court of New York sustaining its constitutionality, *Wasmuth v. Allen*, 14 N.Y. 2d 391, 252 N.Y.S. 2d 65, 200 N.E.2d 65, 200 N.E.2d 756, and the Court dismissed the appeal for want of a substantial federal question, 379 U.S. 11, 85 S.Ct. 86, 13 L.Ed.2d 23 (1964).
>
> Despite a student view that little effect should be given to Supreme Court decisions with respect to substantiality made on motions not orally argued, 68 Colum. L. Rev. 785 (1968), we continue to hold our considered position that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 & n. 3 (1967).

In the latter case cited in *Heaney* it was held:

> It would be inappropriate for us to make an independent examination of the substantiality of the questions here presented since the Supreme Court has considered them not simply in a similar case but in a substantially identical one. The compact clause argument was one of the many advanced by prospective condemnees in an action in the New York courts for a declaration that the statutes authorizing construction of the World Trade Center were unconstitutional; and, after the New York Court of Appeals had ruled against the plaintiffs, *Courtesy Sandwich Shop v. Port of New York Authority*, 12 N.Y.2d 379, 240 N.Y.S.2d 1, 190 N.E.2d 402 (1963), the Supreme Court dismissed an appeal "for want of a substantial federal question." 375 U.S. 78, 84 S. Ct. 194, 11 L.Ed.2d 141 (1963).
>
> [*Port Authority Bondholders Pro. Com. v. Port of New York Authority*, 387 F.2d 259, 262 (2 Cir. 1967)]

Your petitioners therefore contend that the effect of your ruling in *Kisley v. City of Falls Church, supra*, was to foreclose further repetitive litigation by the same or other parties challenging the facial constitutionality of the massage parlor ordinances in question.

II

The Court Below has Departed From the Usual Course of Judicial Proceedings in Holding that Federal Courts are not Called Upon to Refuse Jurisdiction Where Prior and Pending State Civil and Criminal

Actions Raise the Same Constitutional Issues, and Appeals to this Court can be Taken.

The Court below misapplied the reasoning of this Court in *Younger* by holding that past unappealed state determinations and pending proceedings suspended in deference to the federal courts left the district court free to exercise its parallel jurisdiction. In agreeing with Judge Merhige and disagreeing with Judge Kellam on "the scope of *Younger*," the Court of Appeals said:

> "Judge Merhige, in granting an injunction *pendente lite* in No. 73-1131, concluded that *Younger* did not adversely affect his jurisdiction to act, since no plaintiff before him was the subject of a criminal prosecution at the time that suit was filed in his court. Judge Kellam, in declining to exercise jurisdiction in No. 72-2441 and No. 72-2442, concluded to the contrary.
>
> * * *
>
> "In *Lynch v. Snepp*, 472 F.2d 769 (4 Cir. 1973) . . . We expressly adopted the view of Mr. Justice Brennan, stated partially in concurrence and partially in dissent in *Perez v. Ledesma*, 401 U.S. 82, 120, 915 S.Ct. 674, 27 L.Ed.2d 701 (1971), that application of the notions of comity, equity and federalism to oust or require non-exercise of federal power depends upon whether a state proceeding is pending and, if so, on the ground asserted for federal intervention.
>
> * * *

> Thus, we are committed to the view which we believe the correct one, that *Younger* does not apply when there is neither criminal nor civil litigation pending in a state court in which questions sought to be raised in federal litigation by the same parties or those in privity with them are present. We therefore conclude that where, as in Nos. 72-2441 and 72-2442, there was no state criminal prosecution pending against any plaintiff and no plaintiff had pending at the time the district court dismissed the suits, any civil action in a state court in which the issues raised in the federal litigation were present or raised, *Younger* neither authorized nor required the non-exercise of federal jurisdiction (61a-62a).

The Court of Appeals was Concededly in Error on the Existence of Pending Litigation.

The possibility exists that the Court of Appeals may have been confused in consolidating the records of the three cases, or that the Court's understanding of the fact situation on the state litigations was taken from representations made to them in the massage parlor briefs. In the first part of the statement quoted above, it was not true that there was no plaintiff before Judge Merhige who was subject to a criminal prosecution at the time the suit was filed. Only if the status of the parties is reconsidered after the dismissal of Kisley, could it be said to be later true, and then only because the additional Mehrige plaintiff, BO-JAC (Hogge) was the plaintiff in a civil rather than a criminal state action still pending in Hampton.

On the second portion of the Circuit quotation, that before Judge Kellam "no plaintiff had pending, at the time

the District Court dismissed the suits, any civil action in a state court. . .", this statement may be an adoption of the erroneous representation to that effect by BO-JAC counsel.

Whatever confusion of fact may have existed as to the pendency of state actions on the original appeal, the situation was certainly made clear on the rehearing application. But this did not alter the conclusion of the Court of Appeals. Although the cities procured and submitted a Clerk's Certificate of Pendency (12a), the Court said it would nevertheless hold the cities'

> ". . . counsel to the implicit representations made [in failing to] dispute their adversary's assertion that the Hampton case had become moot when a preliminary injunction had been denied." (71a)

But such an "implicit" failure did not exist. As your petitioners point out in the above Statement of the Case, existence of that suit was in the record before the Court of Appeals in Judge Kellam's opinion in the Hampton case (6a) and the same Judge had equally referred to the criminal enforcement previously undertaken by Newport News against Emerson and Phillips (18a).

In sum, it is not the absence of state litigation of these issues which is confusing but rather the multiplicity of such actions. On the filing of the Falls Church suit both Kisley and BO-JAC were parties to pending state civil litigation on the same issues, and Kisley was on appeal from a state conviction. At the time of filing the Hampton federal suit, BO-JAC had a pending, if unsuccessful, state civil action which it had taken to a Virginia Supreme Court judge but had refused to continue to this Court. Phillips

was a plaintiff in both the Hampton and Newport News federal suits and in the latter both Emerson and Phillips had already been convicted by the state when the complaint was filed, and had declined to appeal through the state courts to this Court. In fact, Emerson's subsequent withdrawal as a plaintiff after the remand by the Court of Appeals suggests that he felt himself to be in the same difficulty of prior determination as Kisley.

Petitioners have already shown that the previously heard *Kisley* issues were the same in the state and federal suits. The same is true as to the Hampton case as shown by BO-JAC's "Notice of Application for Injunction" in the state court (15a). This pleading sought to enjoin the City of Hampton from enforcing its Chapter 22.1 on claims of violations of the Virginia Constitution, the U.S. Constitution and the 1964 Federal Civil Rights Act. The state hearing on this included ". . . the law in the case, the evidence presented and the arguments of counsel. . .", and on that basis an order was entered denying the application for a temporary injunction (13a).

Thus, BO-JAC, a plaintiff in the federal District Court in 72-2441 had already applied for and been denied a state injunction. And Judge Kellam specifically found (2a) this federal court plaintiff to have been "a real party in interest" in that state court action. Thus Kisley and BO-JAC had unsuccessfully litigated the issue in state courts and Emerson had been convicted before federal jurisdiction was claimed. When that occurred the three proceedings remaining in the state courts became inactive.

The amended order of Judge Merhige (51a) limiting his injunction only to *future*, not *pending* enforcement, underrates the respect of state courts for federal court rulings on constitutional issues. The pendency of the federal suits

on the same statutes completely prevented any further progress being made in the state courts. The existence or non-existence of an injunction is not the central factor.

The Court of Appeals was in Error in its Interpretation of Younger v. Harris.

a. The Principle of Comity Extends to Prior State Litigation Whether Halted or Abandoned.

Can parties litigate constitutional issues in a state court, then abandon them before appeal in order to renew their prayer in a federal court? In one sense the Court of Appeals was right, that the severance of Kisley, the abandonment by BO-JAC, the past convictions of Emerson and Phillips and the suspension of activity by state courts to await the federal determination, left the situation without an active pending prosecution. Does the *Younger* doctrine justify the taking of parallel federal jurisdiction over questions which could have been carried forward to this Court under state procedures but were abandoned instead? The issue may be unique. Your past decisions have been concerned with active state litigations or the imminence of future prosecution as in the recent argument before you in *Steffel v. Thompson*, No. 72-5581.

But your petitioners contend as well that *Younger* extends also to abandoned suits, that no plaintiff can be permitted to seek a preliminary injunction, receive an adverse decision and then proceed to the courts of the other sovereignty to relitigate *de novo* the same issue. For the Court below to extend *Younger* to permit this was a radical departure from the usual course of judicial proceedings in that it disregarded the essential comity rationale on which that ruling was based.

Consider the time context of the cases at bar. The Supreme Court of Virginia had decided *Kisley v. City of Falls Church, supra,* on March 6, 1972 (19a). Emerson was convicted April 14, then filed his federal suit on April 26 while his criminal appeal was pending in the Hustings Court. Phillips was convicted on April 29, was already a federal plaintiff in Newport News but then joined Hogge in the Hampton complaint before Judge Kellam on May 4. Hogge was still in the state court on his civil suit, the Virginia Supreme Court having denied his injunction on March 29. On these facts under *Younger* the issues before the federal district courts should have been justiciable only to the extent that "comity" between state and federal systems did not apply to abandoned or inactive state suits. Judge Kellam saw this,

> "Because of the petition originally filed in the Circuit Court of the City of Hampton, plaintiffs have two means available for presenting their constitutional claims to a federal tribunal. If plaintiffs pursue their civil action in the state courts and are not successful, they may petition the Supreme Court of the United States for certiorari. In the alternative, plaintiffs may elect to present their claims as defenses in criminal proceedings if such are instituted by the City of Hampton; again, plaintiffs may petition the United States Supreme Court for certiorari if they are unsuccessful in presenting their available state remedies. In either case, plaintiffs have an adequate remedy at law which precludes action by this court." (10a-11a).

Judge Kellam's position is wholly consistent with *Younger* and would have been appropriate even if the Hampton plaintiffs had in fact taken a nonsuit without objection after being denied a temporary injunction by the state court, or, as in the suit before Judge Merhige, had been dismissed as federal parties. Even in cases where there are no pending prosecutions of remaining parties, it is still in the interest of "equity, comity and federalism" to follow the rationale of the *Younger* decisions since no harm could result in allowing the state to proceed where the federal issues can be fairly litigated and there is an adequate recourse to this Court.

In *Younger*, Mr. Justice Black noted that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45. In quoting from *Fenner v. Boykin*, 271 U.S. 240 (1946), Justice Black affirmed that this Court had made clear that even with respect to state criminal proceedings not yet formally instituted, an injunction would be appropriate "only under very special circumstances":

> "Ex Parte Young, 209 U.S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done *except under extraordinary circumstances where the danger of irreparable loss is both great and immediate.* Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against

> the laws of the state and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." (Emphasis added) [271 U.S. at 243-44]

Finally, Justice Black formulated the rule that in order to justify federal intervention the plaintiffs must show "injury other than that incidental to every criminal proceeding brought lawfully and in good faith." 401 U.S. at 47. There is no suggestion in the cases at bar that the federal plaintiffs could show any such injury.

b. *The Court of Appeals was in Error in Disregarding the Legitimate Sphere of Local Legislation.*

Apart from comity between court systems, the rationale of *Younger* would extend to federal/state relations in terms of primary legislative interests. Petitioners argue on the basis of *Younger* for:

> "a system in which there is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious through it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states,"
>
> [401 U.S. at 44]

It is submitted that where state proceedings and appeal to this Court were fully available and no oppressive prosecution

was alleged or shown, these local governments should have been regarded as having primary jurisdiction to proceed with the enforcement of their massage parlor regulations without experiencing the grinding halt to which all state activity was brought once a federal court announced its active jurisdiction over the facial validity of these ordinances.

The primary jurisdiction doctrine applies to federal agencies under federal law. Equally, primary responsibility for the regulations of such local matters as massage parlors should remain in the preliminary province of state and local government, not national government. When federal courts enjoin state courts from proceeding, the rules applicable are those of "comity" between the state and federal courts. But as Mr. Justice Black said in *Younger*, there should be equal concern for comity in the legislative process:

> The combination of the relative remoteness of the controversy, *the impact on the legislative process* of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes . . . (citation omitted.) ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process. (Emphasis added.)
>
> [401 U.S. at 53]

Federal injunctive or declaratory relief has a significant impact on the administration of state laws duly adopted whether or not proceedings are pending between the parties. Local enforcement if not paralyzed entirely, remains uncertain throughout trial and appeal. The fact that the plaintiffs bring their claim within a federal statute for declaratory relief should not enlarge the role of the federal courts in such situations. *Samuel v. Mackel,* 401 U.S. 66, 72 (1971).

c. *The Ruling Below is in Conflict With the Decisions of Other Circuits*

Certiorari should be granted to correct the departure by the Fourth Circuit from the usual course of judicial proceeding in its application of the *Younger* principle. The usual course of judicial proceedings is illustrated in *Becker v. Thompson,* 459 F.2d 919, reh. and reh. en banc denied, 463 F.2d 1338 (5 Cir. 1972) (*supra, sub nom. Steffel v. Thompson*), where the Fifth Circuit concluded, in a class action for injunctive relief and a declaration that the Georgia Trespass statute was unconstitutional as applied to the distribution of handbills in violation of shopping center regulations, that:

> ". . . even though no state prosecution was pending against Steffel, since there was no showing of bad faith harrassment, he was not entitled to a declaratory judgment."
> [459 F.2d at 923].

The court quoted 85 Harv. L. Rev. 304, November, 1971:

> "In short, the reasoning in Younger would appear to ignore any distinction between pending and threatened proceedings, and make denial

> of federal relief obligatory in both situations unless bad faith enforcement can be shown."
>
> [459 F.2d at 922]

And the same principle is referred to equity sources in *Conover v. Montemuro*, 477 F.2d 1073, 1079 (1973) where the Third Circuit Court of Appeals invoked federal abstention and nonintervention policies against a constitutional challenge to the "intake" procedures of a state juvenile court.

Thus, even if your prior summary ruling in *Kisley* is not determinative, the Court of Appeals erred in sustaining federal jurisdiction by reference to *Younger* and its progeny. That Court was in error on the facts, misinterpreted the law as not applying to abandoned state cases and suspended proceedings, ignored the primary legislative responsibility of the states in this field, and conflicted with parallel rulings of other Circuits on the issue.

CONCLUSION

This case presents the important questions of the precedential significance of the summary rulings of this Court and the scope of the doctrine of federal judicial abstention as developed by this Court and as followed in other Circuits. The determination of these issues by this Court is required to define its appellate jurisdiction.

Moreover, the pendency of civil, and criminal state litigation placed the Court of Appeals assumption of federal jurisdiction in conflict with the rulings of this Court and other Circuits. The case is a proper one for the granting of certiorari followed by summary reversal and remand to dismiss the federal complaints.

Respectfully submitted,

Geo. S. Leonard
Attorney for City of Falls Church

Thomas E. Glascock
Attorney for City of Hampton

P.A. Yeapanis
Attorney for City of Newport News

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

PATRICIA HOGGE, *Plaintiff,*	:	
v.	:	**Civil Action No. 42-72-NN**
MEMBERS OF THE CITY COUNCIL, CITY OF HAMPTON, VIRGINIA: DAVID MONTAGUE, Mayor, ANN KILGORE, TOM WATERS, CHARLES WORNOM, HENRY MARTIN, WILLIS COX, HARRY B. DYCHE, each in their official capacity, *Defendants.*	:	

MEMORANDUM ORDER

On April 3, 1972, Patricia Hogge filed applications with this Court seeking a Temporary Restraining Order and a Preliminary Injunction against the members of the City Council of Hampton, Virginia, to restrain them from enforcing Chapter Number 22.1 of the Code of that City.

Chapter Number 22.1, adopted by the Hampton City Council at its regularly scheduled meeting of March 22, 1972, provides for the regulation of massage parlors and similar establishments. The ordinance sets forth the requirements and procedure for obtaining a permit to operate a massage establishment and establishes sanitation standards for the facilities and individual health requirements that must be met by employees and patrons. In addition, Section 22.1-11 of the ordinance provides that "It shall be

unlawful for any person to administer, for hire or reward, to any person of the opposite sex any massage, . . . nor shall any person cause or permit in or about his place of business, . . . any agent, employee or servant or any other person under his control or supervision to administer any such treatment to any person of the opposite sex."

Plaintiff contends that Section 22.1-11 violates Title 7 of the 1964 Civil Rights Act, 42 U.S.C. 2000(e), by "forcing arbitrary sexual discrimination in the hiring and firing of massage parlor attendants," and that the ordinance violates the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Constitution. Plaintiff alleges that she has suffered irreparable financial damage and will continue to do so in the future unless enforcement of Chapter 22.1 is enjoined.[1]

Prior to the filing of the petition in this Court, a petition for a temporary restraining order and an injunction were filed in the Circuit Court for the City of Hampton, Virginia, seeking to enjoin enforcement of the aforesaid ordinance. The plaintiff in that action is Bo-Jac Ltd. T/A Miss Masseuse. While Patricia Hogge is not the named plaintiff in the State Court proceeding, it appears from statements made in this Court, that she is a real party in

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[1] Plaintiff does not allege any facts in the Application for a Temporary Restraining Order, the Affidavit filed in support thereof, or in the Petition for a Preliminary Injunction which establish her standing to seek such relief. She only alleges that she is a "citizen of the State of Virginia and is a citizen and resident living within the jurisdiction of the Federal Court for the Eastern District of Virginia." While this deficiency may be readily corrected by filing amended pleadings as provided by Rule 15 of the Federal Rules of Civil Procedure, until such is done, plaintiff's pleadings are defective and do not establish a right to relief.

interest in that action, and she is a principal stockholder in Bo-Jac Ltd. and an employee of Miss Masseuse. The temporary restraining order was denied by the Circuit Court for the City of Hampton on March 28, 1972. A subsequent petition for a preliminary injunction was also denied by the Supreme Court of Virginia.

Following the action of the State Court in denying a temporary restraining order, plaintiff filed this action. In argument, counsel advised the State Court action was scheduled for a full hearing on April 11th. It has since been learned that the hearing scheduled for April 11th has been postponed. Further, at the time of said argument, it is my understanding plaintiff does not object to a stay of these proceedings pending a determination of the issue by the State Court.

We do not now need to decide the question of jurisdiction of this Court. Assuming, however, that jurisdiction does exist, it does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496; *City of Meridan v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25; *Zwickler v. Koota*, 389 U.S. 241.

Plaintiff originally chose the State forum and even now proceeds in the State Court to reach an adjudication on the merits. To avoid multiplicity of suits, without substantial reason therefor, the District Court is vested with the power to exercise its sound discretion and determine whether an action should be permitted to continue or whether proceedings therein should be stayed pending the outcome of an earlier suit for the same purpose. *Kansas City Southern*

Railway Company v. United States, 282 U.S. 760, 51 S. Ct. 304, 75 L.Ed. 684; *Bertels v. Sullivan,* 312 F. Supp. 63 (E.D. Va. 1970).

When a court has assumed jurisdiction over the subject matter of a suit and is proceeding to dispose of the litigation, other courts should refrain from interfering. Its jurisdiction should hold to the exclusion of all others.

These proceedings are therefore ORDERED STAYED pending final disposition of the action in the Circuit Court for the City of Hampton, Virginia.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
April 18th, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

PATRICIA HOGGE,	)	
	)	
EARLE PHILLIPS,	)	
T/A Paradise Massage Parlor	)	
	)	
BO-JAC, LTD.,	)	
T/A Miss Masseuse,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 42-72-NN
MEMBERS OF THE CITY COUNCIL,	)	
CITY OF HAMPTON, VIRGINIA:	)	
DAVID MONTAGUE, Mayor, ANN	)	
KILGORE, TOM WATERS, CHARLES	)	
WORNOM, HENRY MARTIN, WILLIS	)	
COX, HARRY B. DYCHE, each in	)	
their official capacity,	)	
	)	
Defendants.	)	

[Issued July 24, 1972]

MEMORANDUM OPINION AND ORDER

This matter began as a petition to enjoin the Mayor and other members of the Hampton City Council from enforcing a city ordinance[1] which regulates the operation of

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[1] It seems clear that plaintiffs have failed to include appropriate defendants, including the City of Hampton or an officer concerned with enforcement of municipal ordinances. Practically, an

massage parlors and prohibits any person from administering a massage or similar treatment to any person of the opposite sex. Prior to the institution of this action, plaintiff sought injunctive relief from the Circuit Court of the City of Hampton; when that Court declined to enjoin enforcement of the ordinance, plaintiff petitioned the Supreme Court of Virginia which likewise refused to order the relief sought. Thereafter, this action was filed. As of the present time, it should be noted, there have been no prosecutions for violations of the ordinance, but the City Attorney of Hampton has advised that he will prosecute violations as and when they occur.

After this Court's order of April 18, 1972 stayed these proceedings pending final disposition of the claims initially instituted in the Hampton Circuit Court, plaintiff filed an amended pleading, in which two new parties plaintiff were added, seeking a declaratory judgment that the ordinance in question is unconstitutional.[2] Now, defendants move to dismiss the matter altogether.

Factually and procedurally, this case appears to fall with in the scope of the principles stated in the Supreme Court's recent decisions in *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); and *Boyle v. Landry*, 401 U.S. 77 (1971). In *Younger v. Harris*, Harris hac

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[1] (continued)
order restraining the existing defendants from enforcing the ordinance in question would be worthless since the city council is a legislative body only.

[2] In connection with the "Amended Petition" seeking a declaratory judgment, plaintiffs have demanded that this Court "restrain" defendants from enforcing the massage parlor ordinance.

been indicted for violating the California Criminal Syndicalism Act when he filed a complaint in the federal district court to enjoin the local district attorney from prosecuting him. A three judge court held that it had jurisdiction, held the statute void for vagueness and overbreadth, and restrained further prosecution. On appeal, the Supreme Court reversed, holding that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it . . . ." 401 U.S. at 54. In explaining the basis for its holding, the Court stated:

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. 401 U.S. at 52.

In *Samuels v. Mackell, supra,* the appellants were indicted in a New York state court on charges of criminal anarchy and subsequently filed an action in federal district court claiming harassment and irreparable injury and praying that the state court prosecutions be enjoined or, in the alternative, for a declaratory judgment that the statutes challenged were unconstitutional. The Supreme Court held that:

> . . . in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and

> that where an injunction would be unpermissible under these principles, declaratory relief should ordinarily be denied as well. 401 U.S. at 73.

Obviously, the holding in *Samuels v. Mackell* is not precisely on point with the factual situation here since there have not yet been any prosecutions under the Hampton ordinance. However, the basic principles enumerated in *Younger v. Harris, Samuels v. Mackell,* and *Boyle v. Landry, supra,* indicate that the existence of state prosecutions is not the determinative consideration. Rather, the primary factor appears to be the principle of comity as expressed in *Younger v. Harris* where the Court stated:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. * * * What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not duly interfere with the legitimate activities of the States. 401 U.S. at 44.

As is readily apparent from *Younger v. Harris,* the appropriate forum for an initial challenge to the constitutionality of a state law is in a state court. There, all of a party's claims may be raised as defenses to a criminal prosecution if the party is inclined to test the validity of a particular state law. Certainly that option is open to plaintiffs here.

There is some question whether a "case or controversy" exists between plaintiffs and the City of Hampton and its appropriate officials, inasmuch as there have been no arrests, indictments or prosecutions for violations of the ordinance in question. This issue is suggested by the disposition of the three appellees in *Younger v. Harris, supra,* who were not being prosecuted for violating the challenged statute. Additionally, in *Boyle v. Landry, supra,* the Supreme Court noted that "not a single one of the citizens who brought this action have ever been prosecuted, charged, or even arrested under the particular . . . statute" involved. 401 U.S. at 80. In reversing the decision of the three-judge court which had held an Illinois statute unconstitutional, the Court stated that "the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." 401 U.S. at 81. Since the plaintiffs here have not been prosecuted or charged for violations of the Hampton ordinance in question, they are in no different position from that of the plaintiffs in *Boyle v. Landry,* and these plaintiffs are not entitled to a more favorable disposition of their claims. Nothing in the pleadings indicates that any of the plaintiffs are in jeopardy of suffering "great and immediate" irreparable injury if the City of Hampton is left free to prosecute violations of the ordinance in the normal manner.

Such a showing is a "traditional prerequisite" to obtaining the relief sought. *Younger v. Harris*, 401 U.S. at 46, and without this prerequisite, plaintiffs are not entitled to maintain this action. Accordingly, plaintiffs' Amended Petition and Bill for a Declaratory Judgment" must be dismissed.

In specifically declining to rule on the constitutional validity of the Hampton massage parlor ordinance, this Court is fully aware of the recent decision in *Kisley v. City of Falls Church*, 212 Va. [693], 187 S.E.2d 168 (1972), in which the Supreme Court of Virginia upheld the constitutionality of a Falls Church ordinance prohibiting "any physical contact with the recipient of such [massage] services . . . by a person of the opposite sex." Because of the close similarity of the ordinances, and because of the earlier petition to the Supreme Court of Virginia on the identical question presented here, the practical result of entertaining plaintiffs' claims to a determination on the merits would be to make this Court a court of appeals from the Supreme Court of Virginia. Here it should be pointed out that the procedure which plaintiffs are attempting to follow was proscribed long ago by the Supreme Court's decision in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Because of the petition originally filed in the Circuit Court of the City of Hampton, plaintiffs have two means available for presenting their constitutional claims to a federal tribunal. If plaintiffs pursue their civil action in the state courts and are not successful, they may petition the Supreme Court of the United States for certiorari. In the alternative, plaintiffs may elect to present their claims as defenses in criminal proceedings if such are instituted by the City of Hampton; again, plaintiffs may petition the

United States Supreme Court for certiorari if they are unsuccessful in pursuing their available state remedies. In either case, plaintiffs have an adequate remedy at law which precludes action by this Court. Plaintiff's "Amended Petition and Bill for a Declaratory Judgment" must be and is hereby DISMISSED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
July 24th, 1972.

CITY OF HAMPTON

OLDEST CONTINUOUS ENGLISH SPEAKING SETTLEMENT IN AMERICA

Hampton, Virginia
23369

CIRCUIT COURT – COURT OF LAW AND CHANCERY

[SEAL]

NELSON T. OVERTON, JUDGE
C. M. GIBSON, CLERK

EDGAR A. MASSENBURG, JUDGE
C. M. GIBSON, CLERK

Bo-Jac, Ltd.
vs.
City of Hampton

Chancery #10801

To Whom It May Concern:

I, C.M. Gibson, Clerk of the Circuit Court of the City of Hampton (8th Judicial Circuit), hereby certify that the above captioned matter is still pending on the active docket of this Court and has not as yet been dismissed from the docket.

Given under my hand this 8th day of August, 1973.

/s/ C. M. Gibson, Clerk.

Circuit Court for the City of Hampton, Va. * * * the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and seventy-two.

Book 43 Page 191

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

BO-JAC LTD.
T/A Miss Masseuse,
Petitioner

vs.

#10801

CITY OF HAMPTON, VIRGINIA,
Defendant

[Filed March 29, 1972]

ORDER

This cause came on this day to be heard *ore tenus* upon the application of the Petitioner for a temporary injunction. Evidence on behalf of the Petitioner was presented by James Hogg, who testified that he was owner of BO-JAC LTD., T/A Miss Masseuse. James Hogg testified, in part that he had expended a considerable sum of money to remodel and rehabilitate his place of business which had been a dilapidated laundromat, that the Petitioner had given up a full time job as a construction estimator in order to oversee this business; that he had obtained a business license and a zoning certificate from the City of Hampton in December of 1971, when the business was commenced; that he would lose approximately Seven Hundred Dollars ($700.00) per week net income and his employees and his established clients. James Hogg further testified he could probably comply with the provisions of the ordinance, except he objected to those provisions relating to records of treatment and prohibiting massage by a person of the opposite sex.

Upon consideration of the law in the case, the evidence presented and the arguments of counsel, the Court is of the opinion that the Petitioner has failed to show a proper case for the issuance of a temporary injunction. The Court doth, therefore, DENY the application for temporary injunction, to which action of the Court the Petitioner does object and note his exception thereto.

ENTER this 29th day of March, 1972.

/s/ Nelson T. Overton
Judge

I ask for this:

/s/ Thomas E. Glascock

Have seen:

/s/ Kenneth C. Hogge, Esq.

COPY TESTE:
C. M. GIBSON, Clerk
By Constance M. Rogers
Dep. Clerk

[Filed March 23, 1972]

NOTICE OF APPLICATION FOR INJUNCTION

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

CITY OF HAMPTON,
C/O Thomas E. Glascock
City Attorney
City Hall
Hampton, Virginia,
Defendant

vs. Chancery #10801

Bo-Jac Ltd.
T/A Miss Masseuse,
Plaintiff

TAKE NOTICE that I will, on the 23rd day of March, 1972 at 9:00 A.M. at the Courthouse in the City of Hampton, Virginia make application to the Judge of the Circuit Court for the City of Hampton, Virginia for an Injunction and Restraining Order, to enjoin you, your agents, servants and employees from enforcing Chapter Number 22.1 of the Code of the City of Hampton, Virginia as adopted by the City Council of Hampton, Virginia on March 22, 1972 at its regularly scheduled meeting for the following reasons:

1. Chapter Number 22.1 of the Code of the City of Hampton, Virginia is Ex Post Facto Law.

2. That Chapter Number 22.1 of the Code of the City of Hampton, Virginia is not emergency legislation and should not be treated as such.

3. That the City Council of Hampton, Virginia acted in an invidious and wholly arbitrary manner in enacting

Chapter Number 22.1 of the Code of the City of Hampton, Virginia.

We have complied with Chapter 22-88 of the Code of the City of Hampton, Virginia as well as Zoning Ordinance, Chapter 11 Section 11-1 (9) of the City of Hampton, Virginia. We have expended a considerable sum of money in establishing a legitimate business in the City of Hampton, Virginia. If this Chapter was enforced, we would suffer a irrepairable financial damage to ourselves and our employees.

The City Council by passing this Ordinance, is depriving us and our employees of our Constitutional rights guaranteed us by the Constitution of Virginia, the Constitution of the United States of America and the 1964 Federal Civil Rights Act.

WHEREFORE, your Petitioner respectfully requests the Court to enter an Injunction and Restraining Order to enjoin you, your agents, servants and employees from enforcing in any manner Chapter Number 22.1 of the Code of the City of Hampton, Virginia in order that we and our employees may continue to earn a livelihood and until final disposition as to the Constitutionality and validity of Chapter Number 22.1 of the Code of the City of Hampton, Virginia and said Injunction and Restraining Order to remain in full force and effect until further Order of this Court.

Bo-Jac, Ltd.
T/A Miss Masseuse

By: /s/ Kenneth C. Hogge
Counsel

COPY TESTE:

C. M. GIBSON, Clerk
By /s/ Constance M. Rogers
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

EDWIN EMERSON, T/A Peninsula Massage Parlor T/A Continental Massage Parlor EARLE PHILLIPS, T/A French Massage Parlor SCARLETT ANNE HILLIARD, Plaintiffs v. MEMBERS OF THE CITY COUNCIL, CITY OF NEWPORT NEWS, VIRGINIA: J.W. HORNSBY, JR., Mayor, JESSIE M. RATTLEY, AUBREY H. FITZGERALD, DONALD M. HYATT, O. J. BRITTINGHAM, JR., WILLIAM F. PEACH and JOSEPH C. RITCHIE, each in their official capacity, Defendants.	)	**CIVIL ACTION NO. 48-72-NN**

[Filed July 24, 1972]

ORDER

Plaintiffs in this action seek a declaratory judgment that a Newport News city ordinance prohibiting the operation of a massage parlor where any physical contact with or massage to the recipient is provided by a person of the opposite sex and also prohibits anyone from administering a massage to a person of the opposite sex. Defendants have moved to dismiss the action.

The questions of law raised by the motion to dismiss are essentially the same as those raised in *Hogge v. Members*

of the City Council, City of Hampton, C/A 42-72-NN. While there are differences in the language of the two city ordinances and the parties are different, the factual issues are likewise similar. The only significant factual distinction between the two cases is that the City of Newport News has instituted criminal proceedings for violations of the massage parlor ordinance. Certainly there is no legal or factual distinction which would require different results in the two cases.

For the reasons set forth in this Court's Memorandum Opinion in Hogge, *supra*, plaintiffs' "Amended Petition and Bill for a Declaratory Judgment" must be and hereby is DISMISSED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
July 24th, 1972.

212 Va. 693

ROBERT KISLEY, TRADING AND DOING BUSINESS AS
THE FALLS CHURCH HEALTH CENTER AND
THE THREE SISTERS HEALTH STUDIO

v.

THE CITY OF FALLS CHURCH, ETC., *ET AL.*

Record No. 7807

OPINION BY JUSTICE LAWRENCE W. I'ANSON
RICHMOND, VIRGINIA, MARCH 6, 1972
FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
JAMES KEITH, JUDGE

Complainant, Robert Kisley, trading as The Falls Church Health Center, filed a bill of complaint against the City of Falls Church, praying that the city be restrained from enforcing its ordinance No. 512, which makes it unlawful to operate a massage salon, bath parlor, or any similar type business, where the service rendered to a customer is by a person of the opposite sex, and that the ordinance be declared void; and further, that the city's ordinance No. 510, regulating the operation of health clubs, massage salons, bath parlors and similar establishments, also be invalidated. A temporary injunction was granted restraining the city from enforcing ordinance No. 512, and thereafter The Three Sisters Health Studio was joined as an additional party complainant.

After an *ore tenus* hearing, the chancellor held (1) that ordinance No. 512 is a legitimate exercise of the police power of the city and that it is not invalid as a denial of equal protection of the law under the Federal and State Constitutions; and (2) that a section of ordinance No. 510, restricting the issusance of permits to operate or manage health clubs to a limited class of persons, is unreasonably

restrictive, but the section is severable and the remainder of the ordinance is valid.

Complainants contend on appeal that the ordinances are invalid (1) because they are inconsistent with State statutes; (2) they deprive them of property rights without due process of law and deny them and their employees equal protection of the law; and (3) they are discriminatory in that barber shops are excluded from their operation.

For the stated purpose of securing and promoting the health, safety and general welfare of the people of the City of Falls Church, the city enacted ordinance No. 510, regulating the operation of "health clubs, massage salons, bath parlors and similar establishments." The ordinance provides for licensing, standards for sanitation and hygiene, qualifications of masseurs and masseuses, and it prohibits lewd and lascivious conduct on the part of the employees of such establishments. A "health club" is defined as any establishment which offers service in the form of massages, baths, exercise, or similar services, to club members or to the public for a charge. Excluded from the definition of health clubs are "(1) hospitals, nursing homes, medical clinics, or the offices or quarters of a physician, a surgeon or an osteopath; * * * (2) exercise clubs exclusively for members or clientele of one sex alone where the services, without massage in any form, are performed by persons of the same sex as members or clientele; * * * (3) barber shops and beauty parlors." The terms "masseur" (male) and "masseuse" (female) are defined as persons who practice any one or more of the arts of body massage, either by hand or by mechanical apparatus.

Ordinance No. 512 provides that "It shall be unlawful for any establishment, regardless of whether it is a public or private facility, to operate as a massage salon, bath parlor,

or any similar type business, where any physical contact with the recipient of such services is provided by a person of the opposite sex," and imposes penalties for its violation.

A narrative statement of the facts shows that complainants own and operate massage salons in the City of Falls Church. All of the employees of both establishments are female (masseuses) and all the patrons are male. Kisley admitted that the masseuses massage "every part of the [male patrons'] body, and that includes every part of the body," and that he would have no business without the female massagists.

Complainants argue that the ordinances are invalid because they are inconsistent with §§ 54-273 and 54-276.4, Code of 1950, as amended, 1967 Repl. Vol., and that under the provisions of Code §1-13.17 a city is prohibited from enacting ordinances inconsistent with State law.

Sections 54-273 and 54-276.4 are found within Chapter 12 of the Code, which contains those State statutes regulating "Medicine and Other Healing Arts." Code §54-273 is the definitional section of the chapter and does no more than exclude health club massages from the definition of the "Practice of physical therapy," (subsection 9). Section 54-276.4 provides that nothing in the chapter shall apply to masseurs, among others, who publicly represent themselves as such, within the scope of their usual professional activities.

It appears from those statutes that it was the legislative intent to free masseurs and masseuses from those regulations established in Chapter 12 of the Code. Hence there is no State statute regulating the occupation of massagists and the business of "health clubs, massage salons, bath parlors and similar establishments."

A local legislative body, in the exericse of its police powers, may forbid the doing of an act where State legislation is silent on the subject, and there can be no conflict between a statute and an ordinance where there is no statute dealing with the same subject matter. *King v. County of Arlington,* 195 Va. 1084, 1091, 81 S.E.2d 587, 592 (1954). Moreover, Falls Church is empowered by its charter, §2.03, to adopt ordinances to preserve "the safety, health, peace, good order, comfort, convenience, morals, and welfare of its inhabitants," and to prevent "lewd and disorderly conduct or exhibitions." Thus, vested with the authority to act, and not doing so inconsistently with State law, the city did not violate Code §1-13.17 in adopting the ordinances.

We do not agree with complainants' arguments that the ordinances deprive them of property rights without due process of law and deny them and their employees equal protection of the law.

The general right to regulate the occupation of massagists and the business of massage salons and similar establishments in the interest of public health, safety or morals has been recognized in several jurisdictions. *Cheek v. City of Charlotte,* 273 N.C. 293, 297, 160 S.E.2d 18, 22 (1968); *Patterson v. City of Dallas,* 355 S.W.2d 838 (Tex. Civ. App. 1962); *Ex Parte Maki,* 56 Cal.App.2d 635, 133 P.2d 64 (1943). *See also* 17 A.L.R.2d 1183, 1190.

In *Ex Parte Maki, supra,* a city ordinance forbade any person, for hire or reward, to administer a massage to a person of the opposite sex unless the massage was given under the supervision of a licensed physician. The appellant attacked the constitutionality of the ordinance on the same grounds that are asserted in the present case. The court, in upholding the constitutionality of the ordinance, said:

"The ordinance applies alike to both men and women. * * * The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers." 56 Cal.App.2d at 639, 133 P.2d at 67.

"* * * The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property. * * * Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.

* * * *

"There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. * * *" 56 Cal.App.2d at 643-44, 133 P.2d at 68-69.

The rationale in *Maki* was adopted in *Cheek v. City of Charlotte, supra;* and *Patterson v. City of Dallas, supra.*[1]

Complainants next contend that the ordinances are discriminatory in that barber shops are excluded from their operation.

Whether a particular ordinance enacted pursuant to a general grant of power is void as arbitrary and unreasonable is a question of law for the courts. *Runnels v. Staunton Redevelopment & Housing Authority*, 207 Va. 407, 410, 149 S.E.2d 882, 884 (1966). There exists, however, a

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[1] Compare *J.S.K. Enterprises, Inc. v. Lacey*, 40 Law Week, at 2461 (Wash.Ct.App., Dec. 17, 1971).

a presumption favoring the validity of municipal ordinances and the presumption governs unless it is overcome by unreasonableness apparent on the face of the ordinance or by extrinsic evidence which clearly establishes the unreasonableness. *Nat. Linen Service v. Norfolk,* 196 Va. 277, 279, 83 S.E.2d 401, 403 (1954).

Classifications found within an ordinance carry with them the same presumptions and burdens, and are not in and of themselves discriminatory. It is well settled that "where the reason for classification inheres in the subject matter and the classification is natural and substantial and bears a reasonable relation to the evil sought to be controlled, it is valid." *McWhorter v. Commonwealth,* 191 Va. 857, 867, 63 S.E.2d 20, 25 (1951).

Complainants rely on *Cheek v. City of Charlotte, supra,* in support of their contention that the ordinances are void. There the city enacted a single ordinance which prohibited a person from giving a massage to a patron of the opposite sex in massage parlors, health salons or physical culture studios, but barber shops, beauty parlors, YMCA and YWCA health clubs were expressly excluded from the operation of the ordinance. The Supreme Court of North Carolina held that the ordinance putting barber shops, beauty parlors, YMCA and YWCA health clubs in a separate classification from massage parlors, health salons, physical culture studios, created a purely arbitrary selection and therefore constituted unconsitutional class legislation.

We do not agree with that part of the holding of the *Cheek* case. We think there is a reasonable ground for putting barber shops and beauty parlors in a separate classification from massage parlors, health salons and physical culture studios. The barber shop business is fundamentally different from the massage parlor business. Different

services are offered, different hours of operation are observed, and different advertising techniques are employed. And though both types of businesses offer massages, the types of massages offered are also different. Massages obtained in barber shops are incidental to other services offered and are usually given to the scalp or face. In fact, an ordinance of the City of Falls Church limits massages in barber shops to the scalp, face, neck, or upper part of the body. On the other hand, massage is the principal service of massage parlors and, as in the case of one of the massage salons involved in this appeal, offer massages of "every part of the body."

In light of the inherent character of the subject matter and the evil sought to be eliminated, the reasons for the classifications created by the ordinances under attack are natural and substantial. The ordinances cannot, therefore, be invalidated as creating arbitrary or unreasonable classifications.

For the reasons stated, the decree of the court below is

Affirmed.

APPENDIX B

ORDINANCE NO. 512

AN ORDINANCE TO AMEND ARTICLE IV, CHAPTER TWELVE OF THE CODE OF THE CITY OF FALLS CHURCH, VIRGINIA ENTITLED "OFFENSES AGAINST MORALITY AND DECENCY"

THE CITY OF FALLS CHURCH HEREBY ORDAINS THAT: An Ordinance entitled "Offenses – Miscellaneous" shall be amended as follows:

Add new subsection to read:

12-50 MASSAGE SALONS, TURKISH, RUSSIAN OR MEDICATED BATHS – Massages or baths administered by a person of the opposite sex:

It shall be unlawful for any establishment, regardless of whether it is a public or private facility, to operate as a massage salon, bath parlor, or any similar type business, where any physical contact with the recipient of such services is provided by a person of the opposite sex. Any person violating the provisions of this section, shall, upon conviction, be punished as hereinafter provided in this section; and in addition to such penalty, it shall be the duty of the City Manager of Falls Church, to revoke the license of the owner or manager of the establishment, wherein the provisions of this section shall have been violated.

Violations of the above section, upon conviction, shall be punished by a fine of no less than twenty-five dollars ($25.00) or more than five hundred dollars ($500.00), or no less than ten (10) days or more than one (1) year in the County Jail, or both.

This Ordinance shall be effective as of the date of its adoption.

Adopted March 22, 1972
First Reading March 8, 1971
Second Reading March 22, 1971
(T71-3)

ORDINANCE NO. 510

AN ORDINANCE REGULATING HEALTH CLUBS, MASSAGE SALONS, BATH PARLORS AND SIMILAR ESTABLISHMENTS; PROVIDING FOR LICENSING, SETTING STANDARDS AND AND STATING PENALTIES FOR ANY VIOLATION OF THE ORDINANCE.

THE CITY OF FALLS CHURCH, VIRGINIA HEREBY ORDAINS THAT:

The City Code of the City of Falls Church, Virginia is hereby amended by adding a new Chapter 32, entitled: An Ordinance Regulating Health Clubs, Massage Salons, Bath Parlors and Similar Establishments; Providing for Licensing, Setting Standards and Stating Penalties for Any Violation of the Ordinance.

ARTICLE I

GENERAL PROVISIONS

Section 1 *Authority.* This ordinance is enacted pursuant to the provisions of Section 2.04 of the Charter of the City of Falls Church for the purpose of securing and promoting the health, safety and general welfare of the people of the City of Falls Church, Virginia.

Section 2 *Policy.* It is hereby delcared that the business of operating health clubs as defined herein are businesses affecting the public health, safety and general welfare.

ARTICLE II

DEFINITIONS

Section 1 *Meaning of Particular Words and Phrases.* For the purpose of this ordinance and unless otherwise required by the context:

(a) Health Club. The phrase "health club" shall mean any establishment which offers service in the form of massage, baths, exercises, or similar services, in combination to *club members*, or to the public for a charge.

(b) *Masseur and Masseuse. The term masseur (male) and masseuse (female) is a person who practices any one or more of the arts of body massage, either by hand or mechanical apparatus, oil rubs, corrective gymnastics, mechanotherapy, including color therapy, dietetion hot packs, cabinet, tub, shower, site, vapor, steam or any other special type of bath.*

(c) *The term "health club" does not include: (1) hospitals, nursing homes, medical clinics, or the offices or quarters of a physician or surgeon, or an osteopath, or (2) exercise clubs exclusively for members or clientele of one sex alone where the services, without massage in any form, are performed by persons of the same sex as the members or clientele, or (3) barber shops and beauty parlors.*

ARTICLE III

OCCUPATIONAL REQUIREMENTS

Section 1 *Violations.* On and after the effective date of this ordinance, it shall be unlawful for any person, firm or corporation to engage in the business of a health club without a permit, or being in violation of any requirements or prohibitions set forth in this ordinance or any regulation issued pursuant thereto.

Permit forms are obtainable and are processed in the Office of Inspections and Permits.

Section 2 *General Personnel Requirements.*

(a) No health club shall operate without first obtaining a permit.

(b) No permit shall be issued for any health club except to an owner or manager who is either (i) a physician; (ii) a registered nurse with at least two years nursing experience, (iii) a licensed practical nurse with at least four years nursing experience, or (iv) a registered physical therapist.

(c) No person shall practice as a masseur or masseuse without having satisfactorily completed a course of study in body massage in an approved school of instruction and training. The City Manager shall maintain a list of such approved schools.

Section 3 *General Equipment Standards.*

(a) All tables, tubs, shower stalls and floors (*except reception and administrative areas*) shall be made of nonporous materials which may be readily disinfected.

(b) Closed containers shall be provided for (i) wet towels and (ii) waste material.

Section 4 *Building Structure and Layout.*

(a) No health club shall begin operations until the building occupied or to be occupied shall have been approved by the City Manager, who shall establish procedures for investigation and report by the administrative officers of the building, plumbing, electric and fire prevention codes.

(b) An applicant for a permit to operate a health club shall submit to the City Manager plans and specifications of the quarters proposed to be occupied. Such plans shall show details of entrances, partitions, windows, openings,

ventilation, *plumbing fixtures,* water supply and waste *and vent* connections.

(c) Each health club shall be equipped with toilet and lavatory facilities for patrons, and separate readily available toilet and lavatory facilities for patrons, and separate readily available toilet and lavatory facilities for personnel; *each operating area shall be equipped with a hand lavatory.*

(d) Either the club quarters or the floor of the building on which the quarters are located shall be equipped with a *service sink* for custodial services.

Section 5 *Sanitation.*

(a) All equipment, shower stalls, toilets, lavatories, and any other such accoutrements of the establishment shall be regularly treated with disinfectants, and shall be maintained in a clean and sanitary condition at all times.

(b) Health, *plumbing, electric and other* inspectors shall be given access to any part of the quarters of a health club for purposes of inspection at all reasonable times.

Section 6 *Hygiene.*

(a) No person shall practice any of the services of a health club without a certificate of good health *issued by a duly licensed physician,* commensurate with the nature of the services rendered. Such certificate shall be renewed every six months.

(b) No health club shall knowingly serve any patron infected with any fungus or other skin infections; nor shall service be performed on any patron exhibiting skin inflammation or eruptions; provided, however, that a duly licensed physician may certify that a person may be safely served, prescribing the conditions thereof.

(c) All personnel shall wash his or her hands in hot running water, using a proper soap or disinfectant, before giving any service or treatment to each separate patron.

(d) All towels and tissues, all sheets or other coverings shall be used singularly for each patron and discarded for laundry or disposal immediately after use.

(e) Non-disposable tools of the trade shall be disinfected after use upon one patron.

ARTICLE IV

ENVIRONMENT

Section 1

(a) No part of any quarters of any health club shall be used for, or connected with, any bedroom or sleeping quarters; nor shall any person sleep in such health club except it be for limited periods incidental to and directly related to a massage or bath. This provision shall not preclude the location of a health club in separate quarters of a building housing a hotel or other separate businesses or clubs.

(b) No owner or manager of a health club shall tolerate in his or her establishment any activity or behavior prohibited by the laws of the Commonwealth of Virginia, particularly, but not exclusive of, Chapter 4, Article I, Title 18, Sections 18.1-187 *et seq.*, proscribing prostitution, sodomy, a bawdy place, adultery, fornication, and any lewd and lascivious cohabitation, etc.; and Article III thereof, Section 18.1-227, being the State of Virginia statute on "Obscenity" dealing with shameful or morbid interest in nudity or sex, which appeals to prurient interest, and which covers obscene items, exhibitions, performances, indecent

exposure, illicit photographs or photographic activity, and illicit modeling.

Nor shall any owner or manager tolerate in his or her establishment any activity or behavior which violates the Code of the City of Falls Church, Virginia, particularly but not exclusive of those sections which parallel the State of Virginia statutes on immorality and obscenity detailed above.

Any conviction of any employee of a health club of a violation of the foregoing mentioned statutes and codes shall revolve upon the owner or manager of such club, it being specifically declared hereby that following such a conviction of an employee, the owner or manager of the club shall be prosecuted as an accessory to such violation.

ARTICLE V

DEFERRED COMPLIANCE

Section 1

The owner or manager of any health club operating in the City as of the effective date of this ordinance, may apply for and may be granted by the City Manager a grace period not to exceed six months in order to comply with Section 3, *General Equipment Standards,* and Section 4, *Building Structure and Layout.* All other provisions of this ordinance become effective upon the effective date of the ordinance.

ARTICLE VI

PENALTIES, SAVING CLAUSE AND DATE OF EFFECT

Section 1

A person, firm or corporation who violates any of the provisions of this ordinance shall be guilty of a misdemeanor

and upon conviction thereof, shall be punished by a fine not to exceed One Thousand Dollars, or by imprisonment in jail not exceeding twelve months, or by both such fine and imprisonment. Each day of violation shall constitute a separate offense.

If any part of this ordinance is found by a court to be unsupportable in law, such part is separable and shall not affect the ordinance as to its other parts.

This ordinance shall be construed to be compatible with and not in conflict with supplementary sections of the code – "Miscellaneous – Offenses" – and the "License Tax Ordinance" of the City of Falls Church, Virginia.

This Ordinance shall be effective thirty (30) days from the date of its adoption.

Adopted March 22, 1971
First Reading March 8, 1971
Second Reading March 22, 1971
(T71-8)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

Robert KISLEY, etc., appellant, v. The CITY OF FALLS CHURCH, etc., et al. No. 72-189.

Appeal from the Supreme Court of Virginia.

Facts and opinion, 212 Va. 693, 187 S.E.2d 168.

Oct. 16, 1972. The appeal is dismissed for want of a substantial federal question.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA JOSEPH, *et al.*	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 595-72-R
G. ROBERT HOUSE, JR., *et al.*	:	

[Filed January 15, 1972]

MEMORANDUM

This is a suit challenging the validity of several ordinances of Virginia municipalities which prohibit persons from massaging the bodies of persons of the opposite sex. The plaintiffs are Gloria Joseph, a former Norfolk masseuse, James R. Hogge, Secretary-Treasurer of Bo-Jac, Ltd., a Virginia corporation which operates massage parlors in Norfolk and Richmond, Doris Greene, Secretary of Spence Ent., Inc., a Virginia corporation which operates massage parlors in Norfolk, Richmond, and Alexandria, and Robert Kisley, the owner of a massage parlor in Falls Church. There are two groups of named defendants: the city officers of Norfolk, including the City Manager, Chief of Police, Mayor and City Councilmen, and the city officials of Falls Church, including the Mayor, Vice-Mayor, City Councilmen, City Councilwoman, Chief of Police, City Attorney and City Manager. In addition, the plaintiffs seek to bring suit against the "class of defendants representing officials in similar capacities of municipalities, towns, cities, counties, and other local governing bodies having ordinances or regulations proscribing bisexual massage." Jurisdiction of the action is attained pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202.

The plaintiffs seek a declaration that the ordinances in question are violative of the Constitution and laws of the United States, an injunction against the future enforcement of these ordinances against the plaintiffs, and $50,000 damages. The legal theories offered by the plaintiffs in support of the action are numerous. It is asserted that ordinances prohibiting bisexual massage are violative of (1) the sexual discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and must therefore fall because of the Supremacy Clause of the Constitution (Article VI, §2); (2) the Equal Protection Clause of the Constitution, by virtue of sexual discrimination; (3) the Ninth Amendment's right to privacy; (4) the Due Process Clause, by virtue of having been pre-empted by a general state statutory scheme punishing sex related offenses; (5) the Due Process Clause, on grounds that the ordinances are overly broad and vague.

This matter first came on for hearing on December 12, 1972, when the Court granted a temporary restraining order (TRO) against the Norfolk defendants. On December 21, this Order was extended for an additional ten-day period. On December 26, 1972, without objection, a preliminary injunction was issued against the Norfolk defendants, and a temporary restraining order was issued against the Falls Church defendants. Subsequently, both groups of defendants filed motions to dismiss. In addition, the Falls Church defendants filed a motion for an injunction against the plaintiffs, seeking to prohibit them from filing, either in federal or in state court, further actions challenging the Falls Church massage ordinance. Argument was heard on these motions on January 5, 1973, at which time the TRO against the Falls Church defendants was extended for an additional ten days to the end that the Court have an opportunity to consider the pending motions.

The two ordinances presently challenged are Falls Church Ord. No. 512 and Norfolk Ord. No. 26,623. Ord No. 512 provides the following:

"12-50 MASSAGE SALONS, TURKISH, RUSSIAN OR MEDICATED BATHS – Massages or baths administered by a person of the opposite sex:

"It shall be unlawful for any establishment, regardless of whether it is a public or private facility, to operate as a massage salon, bath parlor, or any similar type business, where any physical contact with the recipient of such services is provided by a person of the opposite sex. Any person violating the provisons of this section, shall, upon conviction, be punished as hereinafter provided in this section; and in addition to such penalty, it shall be the duty of the City Manager of Falls Church, to revoke the license of the owner or manager of the establishment, wherein the provisions of this section shall have been violated.

"Violations of the above section, upon conviction, shall be punished by a fine of no less than twenty-five dollars ($25.00) or more than five hundred dollars ($500.00), or no less than ten (10) days or more than one (1) year in the County Jail, or both.

"This Ordinance shall be effective as of the date of its adoption."

The Norfolk ordinance provides the following:

"Sec. 31-10.1. Body massage.

"It shall be unlawful for any person to massage the body of another person of the opposite sex in any public or private establishment.

"For the purposes of this section, an establishment shall not include: (1) hospitals, nursing homes, medical clinics, rehabilitation centers, the offices or quarters of a licensed physician, surgeon, osteopath, chiropractor, registered nurse, licensed practical nurse or licensed registered physical therapist; or (2) barber shops or beauty parlors when such massage is confined to the scalp, head, face or neck of the recipient of the services; or (3) the private home of the recipient of the services when performed by a member of the recipient's family or an individual set out in (1) or (2) above.

"For the further purposes of this section, massage shall mean the manual or mechanical manipulation and physical contact with the body of the recipient of such services and shall include but not be limited to oil rubs, corrective gymnastics, mechano-therapy including color therapy, dietetics, hot packs and cabinet, tub, shower, sitz, vapor, sauna or any other type of bath or other activity of a similar nature.

"Any person violating any provision of this section shall upon conviction thereof, be guilty of a misdemeanor and be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding twelve months either or both.

I

A preliminary matter before the Court is the plaintiffs' motion to add parties plaintiff (framed as a motion to intervene) and, in conjunction with this, a motion to file an amended complaint. This complaint alters the initial pleading to the extent that it adds new parties and further prays the Court to declare the plaintiffs to be representative of the class composed of masseuses and massage parlor operators similarly situated. The new parties sought to be added are Yoki Sherick and Brenda Mock, Falls Church masseuses, and Hope Health Studios, Inc., Bernice Cook, and P. H. Hellyer, operators of massage parlors in Falls Church. Rule 21, Fed. R. Civ. Pro., provides that parties to an action may be added by order of the Court at any stage of the proceedings. This rule precludes the plaintiffs from being able to file their amended complaint as of right, which they seek to do. The plaintiffs would ordinarily be able to do so under Rule 15(a) because of the failure of Falls Church to file a responsive pleading. However, the main purpose of the amended complaint is to add new plaintiffs. While the original plaintiffs are not to be permitted so blandly to defeat the requirement that the Court must order such additions by proceeding under Rule 15, 3 *Moore's Federal Practice* ¶ 15.07[2] at 858 (1972), the Court concludes it appropriate to exercise the discretion vested in it by Rules 15 and 21 and permit the filing of the amended complaint. The addition of parties is not made at a late stage of the proceedings. The Court recognized that it is sought for the primary purpose of hopefully defeating a plea of *res judicata* by the Falls Church defendants. To disallow the joinder, and perhaps also to uphold the Falls Church defendants' plea of *res judicata,* would doubtless produce the filing of another

suit raising identical issues by the new plaintiffs. This result is repetitive litigation which this Court is bound to avoid. The amended complaint will be filed.

II

A second preliminary matter involved the plaintiffs' request that the Court declare this to be a proper class as to the alleged plaintiff and defendant classes pursuant to Rule 23(b)(1), Fed. R. Civ. Proc. The Court concludes that it cannot do so. Although the plaintiffs assert that "[t]he class is so numerous that joinder of all plaintiff and defendant members is impracticable," they do not represent to the Court even an approximate number of Virginia municipalities which have ordinances against bisexual massage. Several cities in addition to the named defendants, notably Fairfax, Hampton and Newport News, are mentioned as having ordinances. Nevertheless, the plaintiffs have not yet met their burden of showing that it is extremely difficult or inconvenient to join all members of the purported defendant class. See 7 Wright and Miller, *Federal Practice and Procedure* §1762, p. 593-94 (1972); 3B *Moore's Federal Practice* 23-278 (1972). Accordingly, the Court will conditionally deny the plaintiffs' motion for a declaration of a class of defendants. Neither, in the absence of a proper defendant class, is there a proper plaintiff class. The only persons, other than the named plaintiffs, who have a case or controversy with the named defendants are other masseuses and massage parlor operators in Falls Church and Norfolk. There is no indication that there exist a sufficient number of such parties to justify the declaration of a class. The action therefore will proceed as a named parties action.

III

The defendants in their brief rely heavily upon a plea of *res judicata*. It appears from the record that the plaintiff Robert Kisley brought suit on March 24, 1971, in the Circuit Court of Fairfax County against councilmen and city officials of Falls Church. In this action Kisley sought an injunction against the enforcement of Ord. No. 512 and a declaration that it was inconsistent with the laws and Constitution of the United States and Virginia and that it was arbitrary and capricious. On April 19, 1971, a temporary injunction against the defendants was dissolved, and the action was dismissed. This decision was appealed to the Virginia Supreme Court, where Kisley argued that the ordinances are inconsistent with state statutes, that they deny the plaintiff due process and equal protection of the law, and that they are discriminatory, in that barber shops are excluded from the operations of the ordinance. The Supreme Court of Virginia ruled against Kisley on each of his arguments. *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972). Kisley appealed this decision to the United States Supreme Court, but on October 16, 1972, that Court dismissed the appeal for want of a substantial federal question. *Kisley v. City of Falls Church*, 93 S.Ct. 237 (1972).

From this history of prior litigation, the Court concludes that Robert Kisley has had his day in court. Several of the bases on which he seeks to invalidate Ord. No. 512 were pursued in his previous action. More importantly, Kisley could have raised every argument and theory upon which he now relies. The doctrine of, and policy behind, *res judicata* dictates that a party not be allowed voluntarily to litigate a claim and then, upon its unsuccessful disposition, to relitigate the same on a new legal theory.

Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968); *Acree v. Air Lines Pilots Ass'n*, 390 F.2d 199 (5th Cir. 1968); *Brotherhood of R. R. Trainmen v. Chicago, M., St. P. & P. RR Co.*, 380 F.2d 605 (D.C. Cir. 1967). To permit such subsequent suits would be to prolong litigation interminably. This conclusion is not altered by the fact that the prior decision was rendered by a state court, while the present litigation is pursued in the federal system. The statement by the Fifth Circuit Court of Appeals cited by the defendants states succinctly the proper policy:

> "State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts."

Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (1967); see also *Angel v. Bullington*, 330 U.S. 183 (1947); *Patterson v. City of Newport News*, 364 F.2d 816 (4th Cir. 1966). As to the plaintiff Kisley, the plea of *res judicata* is well taken, and he will be dismissed as a party plaintiff.

Kisley is the only party, however, who is precluded by the doctrine of *res judicata* or collateral estoppel. None of the other parties plaintiff in this action were parties in the previous litigation, nor does it appear that any of them were in privity with or successors to Kisley. To rule, as the Norfolk defendants in particular seem to request, that Kisley's adverse state decision bars an action by the other parties would clearly deny them their day in court. In the absence of an order in the state court allowing a class action, such parties may if jurisdiction be present litigate their

alleged controversy in the federal courts, including suits centering about ordinances which previously withstood attacks by other parties. *Carter v. City of Forth Worth*, 456 F.2d 572 (5th Cir. 1972); *Jeffries v. Swank*, 337 F. Supp. 1062 (D.C. Ill. 1971).

IV

The defendants urge this Court to abstain from taking further action in this case pending the outcome of a civil suit filed by Robert Kisley in the Circuit Court of Fairfax County on November 14, 1972. This argument may now be moot by reason of the Court's conclusion that Kisley should be dropped as a plaintiff from this proceeding. Even if it is not, however, the Court concludes that this case does not present the sort of situation which calls for federal abstention. Federal and state courts have concurrent jurisdiction to decide issues of federal law. Both may proceed simultaneously. It is only in certain, well-defined circumstances that a federal court will abstain from exercising its jurisdiction pending the outcome of state proceedings, whether or not such state proceedings are then pending.

The plaintiffs have not shown the Court that this case falls within a category for which abstention is called. Abstention is most generally appropriate where the meaning and effect of the statute or ordinance under attack is not clear and where construction by the state court "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The primary grounds of attack by the plaintiffs in this case is that the prohibition of bisexual massage

is contrary to federal law. Any interpretation by a state court of the ordinances in question could in no way alter the existence of this prohibition in the ordinances. Indeed, the Virginia Supreme Court has already examined the Falls Church ordinance and considered its meaning. The only claim made by the plaintiffs which might possibly be rendered moot by further interpretation of the ordinance is the claim that they are overly broad and vague. Had this been the sole claim made, the Court might consider abstention. However, in light of the substantial claims attacking the substance of the ordinances and the fact that the Virginia courts have already construed the Falls Church ordinance, the Court concludes that comity does not require it to abstain, and indeed it is the Court's duty not to.

In line with its abstention argument, the defendants also urge that this action is precluded by 28 U.S.C. §2283, the anti-injunction statute, which prohibits, with certain exceptions, the issuance of federal injunctions to stay pending state court proceedings. The injunction sought by the plaintiffs does not seek to enjoin the Fairfax County civil proceeding. Accordingly, §2283 does not bar this action as far as Kisley's civil suit is concerned.

V

On November 16, 1972, a prosecution was filed before the Municipal Court of Falls Church against Robert Kisley for violation of Ord. No. 512. The Court has not been made aware of the progress of this prosecution, but if it were still pending and if Robert Kisley were the sole plaintiff in this action, then, of course, the Court could not entertain the instant action. It would be precluded from doing so by the equitable doctrine against the enjoining

of pending criminal actions expressed in *Younger v. Harris*, 401 U.S. 37 (1971). Even if the complaint were not read to seek an injunction against the pending prosecution, the Court would in its opinion be precluded from rendering a declaratory judgment while the criminal action was proceeding. *Samuels v. Mackell*, 401 U.S. 66 (1971). However, Kisley is no longer a plaintiff to this action, and the Court's declaration cannot affect his pending prosecution. Indeed the Court does not read the complaint to seek an injunction against pending, as well as future criminal prosecution, such that *Younger (supra)* and §2283 problems arise. *See Baines v. City of Danville*, 337 F.2d 579, 595 (4th Cir. 1964) (restraints upon future prosecutions are beyond the reach of §2283).

VI

The final points in support of defendants' motion to dismiss are that the massage parlor operators are not real parties in interest, that venue in the Richmond division is improper and that the complaint fails to state a cause of action against the defendants in their individual capacity. The first point is covered in the Court's discussion of probability of success. The third point goes basically to the issue of damages, and the Court elects to defer judgment on that issue. As to venue, *Gilbert v. General Electric Co.*, 347 F.Supp. 1058 (E.D. Va., 1972) *aff'd*, makes clear that an action brought pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, may be brought in any district court within a state. Venue is thus proper in Richmond.

The defendants further assert that they are entitled to a three-judge court to hear this action. This contention is totally without merit, since the ordinances in question are local, rather than state-wide, in nature.

The defendants' motion to dimiss will be denied. Their motion for an injunction against future judicial proceedings by the plaintiffs will be continued under advisement.

MOTION PRELIMINARY INJUNCTION

Turning to the merits of the motion for a preliminary injunction, the Court takes note that the purpose of such an injunction is "to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proofs and according to the principles of equity." *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (1932). The first question in this action is just what the status quo at the time of this suit was. The defendants contend that the Falls Church massage parlors were not in operation at the time this Court issued its TRO and that to issue a preliminary injunction would be to upset the status quo.

The record reveals that Ord. No. 512 became effective on March 22, 1971. Immediately thereafter, on March 24, 1971, Robert Kisley secured a temporary injunction against the enforcement of the ordinance. This injunction was subsequently dissolved, but the case was appealed to the Virginia Supreme Court and to the United States Supreme Court. During that entire period, until October of 1972, the ordinance apparently was not enforced, except for an approximately one-week period during 1971. The parlors remained in operation except for that short period. During the fall of 1972, enforcement of the ordinance began briefly, and Kisley testified that his operation was again closed for approximately one week. Subsequently, this Court issued a restraining order against the enforcement of the ordinance, and the parlors reopened.

The Court concludes from the history of this ordinance's enforcement that the status quo to be preserved is the non-enforcement of the ordinance. Certainly, if the plaintiffs had come to this Court on March 24, 1971, a TRO against the enforcement of the ordinance would have been preservative of the status quo, rather than the contrary. The continued nonenforcement of Ord. No. 512 from the date of its passage leads the Court to conclude that the same considerations apply at this time.

In determining whether to issue a preliminary injunction, the Court must weigh equities and consider various factors. Not the least of these is the likelihood that the plaintiffs will succeed on the merits at trial.

Upon thorough examination of the legal theories upon which the plaintiffs proceed, the Court concludes that there is a likelihood of success as to at least one of them. Title VII of the Civil Rights Acts, 42 U.S.C. §2000e, provides that an employer cannot "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . privileges of employment, because of such individual's . . . sex." Although the Act expressly excludes municipalities from the definition of "employer," courts have held that the supremacy clause voids those statutes and ordinances which require private employers to violate the terms of the Act. See, *e.g.*, *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (D.C. Ohio 1971); *Potlatch Forests, Inc. v. Hays*, 318 F. Supp. 1368 (D.C. Ark. 1970). Accordingly, if the plaintiffs can establish that the ordinance discriminates on the basis of sex within the meaning of the act, they will succeed on the merits.[1] Such proof is entirely conceivable

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[1] From unrefuted representation made by the plaintiffs' counsel at oral argument, it appears that Gloria Joseph, one of the plaintiffs,

(continued)

under the strict requirements of Title VII. See *Corey v. City of Dallas*, C.A. No. 3-5519-D (N.D. Tex. Nov. 29, 1972).

The other grounds for relief asserted by the plaintiffs also present a likelihood, though somewhat less substantial, of success. There is some possibility of success on the basis of the equal protection clause. More importantly, the Court's reading of the Falls Church ordinance indicates that the plaintiffs' attack based on vagueness may be well founded. While the Court may ultimately abstain from considering this contention against the Norfolk ordinance in order that state courts may be given an opportunity to limit the breadth of that ordinance, such an opportunity has already been afforded as to the Falls Church ordinance, making abstention improper as to it. There is a likelihood of success against the Falls Church ordinance on this claim.

The evidence before the Court also establishes that there is a grave danger that the plaintiffs will suffer irreparable

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[1] (continued)
has already brought a complaint before the Equal Employment Opportunity Commission. She was given a waiver by the EEOC, which appears to satisfy the requirement that she exhaust her administrative remedies prior to bringing this action. Although Miss Joseph is from Norfolk rather than Falls Church, it is generally held that only one member of a class need exhaust administrative remedies. See, *e.g.*, *Butler v. Local Nos. 4 & 269, Laborer's International Union*, 308 F. Supp. 528 (D.C. Ill. 1969). While the Court has not declared a plaintiff class in this action, it concludes that the same considerations may well apply. Even if they do not, it is not entirely clear that EEOC remedies need be exhausted in an action such as this, where the actual party defendant is not the employer, but the municipality, and where the gravamen of the action is under the supremacy clause. See, *e.g.*, *Potlatch Forests, Inc. v. Hays, supra*, 318 F. Supp. 1368.

harm from the enforcement or Ord. No. 512. Sexual discrimination, like racial discrimination, denigrates the humanity of those discriminated against. It is not in any realistic sense compensable by damages. In addition, the massage parlor operators may also suffer irreparable injury. Although such injury is only monetary in nature, there is serious doubt as to whether the plaintiffs have a cause of action for damages against any party. If they do not, any monetary losses which they may incur between this date and the date of any future trial and decision would be irretrievable.

Finally, the Court must consider the effect which a preliminary injunction would have upon the defendants. While a prohibition against the enforcement of any duly enacted law or ordinance is always a grave matter, the Court notes as it did previously the lengthy period during which this ordinance was on the books but not enforced. A preliminary injunction would not work any great disruption to the orderly enforcement of Falls Church's laws. To the contrary, it would merely continue a prior standing policy of nonenforcement.

In sum, upon a thorough balancing of the equities, the Court concludes that a preliminary injunction should issue. An order in accordance with this conclusion shall issue.

/s/ ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

Date: January 15, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA JOSEPH, *et al.*	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 595-72-R**
G. ROBERT HOUSE, JR., *et al.*	:	

[Filed January 15, 1972]

ORDER

In accordance with the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The defendants' motions to dismiss be, and the same are hereby, denied.

2. The temporary restraining order heretofore entered against the Falls Church defendants shall be and is hereby converted to a preliminary injunction and the said defendants be, and they are hereby, enjoined from the enforcement of any municipal ordinance which prohibits bisexual physical massage until the further order of the Court.

All parties are directed to appear before this Court at 1:00 p.m. on Friday, January 19, 1973, for the purposes of setting this action down for hearing on an expedited basis.

Let the Clerk send copy of this order to all counsel of record.

/s/ **ROBERT R. MERHIGE, JR.**
UNITED STATES DISTRICT JUDGE

Date: 1-15-73

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA JOSEPH, *et al.*	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 595-72-R
G. ROBERT HOUSE, JR., *et al.*	:	

[Filed January 16, 1973]

ORDER
AMENDING ORDER ENTERED
ON JANUARY 15, 1973

Deeming it just and proper so to do, it is ORDERED that the order of this Court entered on January 15, 1973, be, and the same is hereby, amended to read as follows:

1. The plaintiffs' motion to amend their complaints be, and the same is hereby, granted. Let the Clerk file such amended complaint.

2. The defendants' motion to dismiss be, and the same is hereby, granted as to the plaintiff Kisley and denied as to all other plaintiffs.

3. The second paragraph of the Court's original order is amended to enjoin only future, not presently pending, enforcement of any municipal ordinance which prohibits bi-sexual physical massage.

Let the Clerk send copies of this order to counsel of record.

Date:
January 16, 1973

/s/ ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA JOSEPH, *et al.*	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 595-72-R**
G. ROBERT HOUSE, JR., *et al.*	:	

[Filed January 16, 1973]

MEMORANDUM

The Falls Church defendants have moved for a stay pending appeal of the order entered by this Court on January 15, 1973, converting a temporary restraining order then existing into a preliminary injunction. The only grounds presented in support of the motion, other than those already dealt with by the Court, are that the Court's order disenables the defendants from acting as parties in two litigations now pending. As is apparent from the Court's memorandum of January 15, 1973, it did not intend in any way to enjoin the defendants from participating in the suits presently pending. The Court's order has now been amended to more clearly reflect this conclusion.

The Court concludes that a stay of its order should not be granted. The legal principles by which a stay should be granted are succinctly spelled out in the case of *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970) and are as follows: The party seeking the stay must show (1) that he will likely prevail on the merits of the appeal. In the instant case, the defendants' motion is not accompanied by

any authorities, nor is it accompanied by any argument or contention that they will likely prevail. (2) He must show he will suffer irreparable injury if the stay is denied. (3) He must show that other parties will not be substantially harmed by the stay. (4) He must show that the public interest will be served by granting the stay. No suggestion is made that the defendants can show any of these factors. Accordingly, the motion will be denied.

An order in accordance with this memorandum will issue.

/s/ ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

Date: January 16, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA JOSEPH, *et al.*	:	
	:	
v.	:	**CIVIL ACTION NO. 595-72-R**
	:	
G. ROBERT HOUSE, JR., *et al.*	:	

[Filed January 16, 1973]

ORDER
DENYING STAY PENDING APPEAL

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that the defendants' motion for a stay of this Court's order of January 15, 1973, be, and the same is hereby, denied.

Let the Clerk send copies of the memorandum and order to counsel of record.

/s/ ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

Date: January 16, 1973.

[Seal - Virginia] CLERK'S OFFICE [Seal - Fairfax County]

CIRCUIT COURT OF FAIRFAX COUNTY
FAIRFAX, VIRGINIA

W. Franklin Gooding
Clerk of Court

Deputy Clerks
Edward E. Young
Mrs. Frances D. Connell
Mrs. Sylvia M. Presgrave.

August 22, 1973

Mr. La Rue Van Meter, City Attorney
City of Falls Church
Falls Church, Virginia

Re: Robert Kisley, Complainant versus
Louis H. Blair, Mayor of the City of Falls Church, *et al,* Defendants, Chancery 38021

Dear Mr. Van Meter:

I wish to advise that the record in the above case does not show that a non-suit or final decree has been entered and the case is still pending on our docket.

Very truly yours,

W. FRANKLIN GOODING, CLERK

By: /s/ Frances D. Connell
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1131

Gloria Joseph, James Robert Hogge,
t/a Miss Masseuse, t/a BO-JAC, Ltd;
Doris Green, t/a Spence Enterprises, Inc.,
and Robert Kisley, t/a The Falls Church
Health Center,

Appellees,

v.

Louis H. Blair, Mayor, City of Falls
Church, Va., Lee M. Rhoads, Vice-Mayor,
City of Falls Church, Paul Brockman,
James J. Lynch, Jimmie H. Singleton,
Harold L. Miller, Councilmen, Falls Church,
Edna A. Clark, Councilwoman, City of
Falls Church, Robert F. Wheeler, Chief of
Police, City of Falls Church, LaRue Van Meter,
City Attorney, City of Falls Church and
Harry E. Wells, City Manager, City of
Falls Church,

Appellants.

**Appeal from The United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.**

No. 72-2441

Patricia Hogge,

v. *Appellant,*

Members of the City Council, City of Hampton, Virginia: David Montague, Mayor, Ann Kilgore, Tom Waters, Charles Wormon, Henry Martin, Willis Cox, Harry B. Dyche, each in their official capacity,

Appellees.

No. 72-2442

Edwin Emerson,
T/A Peninsula Massage Parlor
T/A Continental Massage Parlor,

v. *Appellant,*

Members of the City Council, City of Newport News, Virginia: J. W. Hornsby, Jr., Mayor, Jessie M. Battley, Aubrey H. Fitzgerald, Donald M. Hyatt, O. J. Brittingham, Jr., William F. Peach and Joseph C. Ritchie, each in their official capacity,

Appellees.

Appeals from The United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, District Judge.

Argued April 3, 1973 Decided July 26, 1973

Before BOREMAN, Senior Circuit Judge, WINTER, Circuit Judge and BLAIR, District Judge.

No. 73-1131 - George S. Leonard (LaRue Van Meter, City Attorney of Falls Church, Virginia, and Philip N. Brophy on brief) for Appellants; Philip J. Hirschkop (Joseph Bambacus on brief) for Appellees.

Nos. 72-2441 and 72-2442 - W. Anthony Fitch (Kenneth C. Hogge and Carmel, Gray and Hogge on brief) for Appellants in Nos. 72-2441 and 72-2442; Thomas E. Glascock, City Attorney of Hampton, Virginia, for Appellee in No. 72-2441; P.A. Yeapanis, City Attorney of Newport News, Virginia, (Robert M. Roylance, Assistant City Attorney of Newport News, Virginia, on brief) for Appellees in No. 72-2442.

WINTER, Circuit Judge:

The scope and application of Younger v. Harris, 401 U.S. 36 (1971) and its progeny are the major questions in each of these appeals, and we therefore decide them together. The appeals arise from suits to have declared invalid and to enjoin enforcement of the ordinances of Falls Church, Norfolk, Hampton, and Newport News, Virginia, which, under sanction of criminal penalty, regulate massage parlors and, with certain exceptions, prohibit the massage of any person by another of the opposite sex. The validity of the ordinances was attacked on numerous grounds, including the claim that they violated

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), in that they require arbitrary sexual discrimination in the employment of massage parlor attendants, that the ordinances were in conflict with that Act and are hence inoperative under the supremacy clause of the United States Constitution, that the ordinances unlawfully discriminate on the basis of sex in violation of the equal protection clause of the fourteenth amendment, and that the ordinances violate the due process clause because they are vague and ambiguous. In No. 73-1131, Judge Merhige exercised federal jurisdiction and granted an injunction *pendente lite;* we affirm. In Nos. 72-2441 and 72-2442, Judge Kellam, relying mainly on *Younger,* declined to exercise federal jurisdiction and dismissed the suits; we reverse and remand for further proceedings.

I.

While the ordinances vary in form in certain regards which are not material here, they have as their objective the licensing and relation of "massage parlors" and purport to prohibit the massage of any person by another of the opposite sex, except in the case of doctors, nurses, licensed physiotherapists, members of the subject's family, and the like. The validity of the Falls Church ordinance was initially attacked by one Robert Kisley, who sued the Circuit Court of Fairfax County, alleging that the ordinances were invalid under state and federal law because of an arbitrary classification by sex and the denial of due process and equal protection of the laws.[1]

[1] Kisley initially joined as a plaintiff with others in No. 73-1131, but Judge Merhige denied relief as to him on the ground of *res judicata* or collateral estoppel, and Kisley did not appeal. Since the state litigation was not a class action and the plaintiffs in No. 73-

(continued)

The Circuit Court ruled against these contentions, holding the ordinances valid; and on appeal, the Supreme Court of Virginia affirmed. Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972). Kisley then appealed to the Supreme Court of the United States, but that Court dismissed the appeal "for want of a substantial federal question." ___U.S.___(1972).

When the various suits were filed in the Eastern District of Virginia, no criminal prosecutions against any plaintiff had begun.[2] Presumably, by reason of a temporary restraining order and the subsequent injunction *pendente lite*, there have been no prosecutions in Norfolk or in Falls Church. In Hampton, no prosecutions have begun, but plaintiffs alleged, and the allegation is not denied, that the City Attorney had advised "that he will prosecute violations as and when they occur." In Newport News, prosecutions for violation of the ordinance had been instituted at the time of suit, but the prosecutions were against persons other than the plaintiffs.

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[1] (continued) 1131 were neither parties to the suit nor in privity with Kisley, Judge Merhige held that the other plaintiffs were not barred by these defenses from proceeding.

[2] Prior to instituting suit in the district court, Bo-Jac, Ltd., a plaintiff in No. 72-2441 and No. 73-1131, had filed a petition in the Hampton Circuit Court seeking a temporary injunction against enforcement of the Hampton ordinance. This suit was pending when the complaint was filed in the district court. The district court stayed its proceedings pending final disposition of the litigation in the Hampton Circuit Court. When Bo-Jac, Ltd., was denied a preliminary injunction in the state court, Bo-Jac dismissed the proceedings before determination on the merits. It was thereafter that the district court declined to exercise federal jurisdiction.

II.

Judge Merhige, in granting an injunction *pendente lite* in No. 73-1131, concluded that *Younger* did not adversely affect his jurisdiction to act, since no plaintiff before him was the subject of a criminal prosecution at the time that suit was filed in his court. Judge Kellam, in declining to exercise jurisdiction in No. 72-2441 and No. 72-2442, concluded to the contrary. He recognized that there had been no prosecutions instituted against any plaintiff at the time that suit was filed, but he held nevertheless that application of *Younger* did not depend upon the existence of a pending state prosecution, and that the principle of comity stressed by *Younger* required that the "initial challenge to the constitutionality of a state law . . . [be made] in a state court." Additionally Judge Kellam thought that *Younger* and Boyle v. Landry, 401 U.S. 77 (1971), cast doubt upon the question whether a "case or controversy" existed between the plaintiffs and defendants in the suits involving the Hampton and Newport News ordinances. In summary, Judge Kellam concluded that plaintiffs should pursue a civil action in the state courts, and if they were not successful, "petition the Supreme Court of the United States for certiorari," or alternatively, "plaintiffs may elect to present their claims as defenses in criminal proceedings if such are instituted by the City of Hampton; again, plaintiffs may petition the United States Supreme Court for certiorari if they are unsuccessful. . . ." We agree with Judge Merhige and disagree with Judge Kellam with regard to the scope of *Younger*.

In Lynch v. Snepp, 472 F.2d 769 (4 Cir. 1973), we had occasion to consider the rationale and scope of *Younger*. There we recognized that federal courts have the power under the Civil Rights Acts and various provisions of the

constitution to intercede, on the ground of violation of federal right, in the state administration of state criminal law, including the power to enjoin state proceedings. At the same time, long-standing public policy is against exercise of the power with regard to state proceedings, and *Younger* is an articulation of how the admitted power and this desirable policy are to be reconciled when one impinges upon the other. We expressly adopted the view of Mr. Justice Brenan, stated partially in concurrence and partially in dissent in Perez v. Ledesma, 401 U.S. 82, 120 (1971), that application of the notions of comity, equity and federalism to oust or require non-exercise of federal power depends upon whether a state proceeding is pending and, if so, on the ground asserted for federal intervention. We noted Lake Carrier's Assoc. v. MacMullan, 406 U.S. 498, [(1972), where it was stated: "The decisions there [*Younger* and Samuels v. Mackell, 401 U.S. 66 (1971)] were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." Thus, we are committed to the view, which we believe the correct one, that *Younger* does not apply when there is neither criminal nor civil litigation pending in a state court in which questions sought to be raised in federal litigation by the same parties or those in privity with them are present. We therefore conclude that where, as in Nos. 72-2441 and 72-2442, there was no state criminal prosecution pending against any plaintiff and no plaintiff had pending, at the time the district court dismissed the suits, any civil action in a state court in which the issues raised in the federal litigation were present or raised, *Younger*

neither authorized nor required the non-exercise of federal jurisdiction.[3]

Nor do we agree that there was no case or controversy between plaintiffs and defendants in Nos. 72-2441 and 72-2442. In Boyle v. Landry, plaintiffs were black citizens of Chicago who sought and obtained a declaration of the invalidity of an Illinois intimidation statute for overbreadth and an injunction against its enforcement. The Supreme Court reversed on the ground that plaintiffs had neither alleged nor shown that they were threatened with arrest or prosecution under the statute at any time, or that they were in any jeopardy of suffering irreparable injury if Illinois was left free to prosecute in the normal manner.

By contrast, in the instant cases, plaintiffs are the owners of "massage parlors," and masseuses employed in such establishments in Hampton and Newport News, where, it is alleged, massage is administered to persons of the opposite sex. Enforcement of the ordinance was threatened in Hampton and had begun in Newport News. The threat to plaintiffs' continued livelihood and freedom from prosecution was real. Their request for declaratory and injunctive relief against imminent infringement of their alleged federal rights constituted "more than speculation about the future." Boyle v. Landry, 401 U.S. at 81; Wright, FEDERAL COURTS §12 (1970). We have no doubt that there was a case or controversy between the parties in No. 72-2441 and No. 72-2442.

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[3] These are not cases where the general abstention doctrine would justify dismissal. The alleged constitutional infirmities in the ordinances and their alleged transgression of the federal constitution and statutes do not depend upon any state construction of state legislative enactment. No ambiguous state law issue remains to be resolved. Wohl v. Keene, ___ F.2d ___ (4 Cir. 1973).

III.

In No. 73-1131, several contentions are advanced why the injunction *pendente lite* granted by Judge Merhige should be vacated. Only one, we think, requires extended discussion. Before proceeding to it, we state our conclusion that Judge Merhige did not abuse his discretion in granting temporary injunctive relief. West Virginia Highlands Conserv v. Island Creek Coal Co., 441 F.2d 232 (4 Cir. 1971). Of course we do not pass on the ultimate merits of plaintiffs' claims that the Norfolk and Falls Church ordinances violate Title VII of the Civil Rights Act of 1964, that they were in conflict with that Act and that they deny due process and equal protection, but we agree that the claims are not insubstantial and there was a sufficient basis on which the district court could conclude that plaintiffs would suffer irreparable injury if interm relief were not granted. A three-judge court was not required by 28 U.S.C. §2383, since only the validity of local ordinances was in issue. Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541 (1972); Moody v. Flowers, 387 U.S. 97 (1967). Venue was properly in the Eastern District of Virginia, 28 U.S.C. §1391. Since the Eastern District of Virginia is not subdivided into divisions, there was nothing improper in plaintiffs' filing suit in Richmond.

The contention which requires some discussion is that the dismissal by the Supreme Court of the United States for want of a substantial federal question in the initial litigation instituted by Kisley is *res judicata* of the validity of the ordinances.[4] The meaning of a dismissal for want

[4] Defendants in No. 73-1131 also argue that the decision of the Virginia Supreme Court in Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972), "conclusively adjudicated" the issues

(continued)

of a substantial federal question has been debated, with conflicting conclusions, within the circuits. *Compare* Dillenburg v. Kramer, 469 F.2d 1222, 1225 (9 Cir. 1972) *with* Doe v. Hodgson, ___F.2d___(No. 72-1744, 2 Cir. May 1, 1973); and United States ex rel. Epton v. Nenna, 446 F. 2d 363, 366 (2 Cir.), cert. denied, 404 U.S. 948 (1971).[5] We may be committed to the view that summary dismissal for want of a substantial federal question *may* constitute an adjudication on the merits. In Hall v. Thornton, 445 F.2d 834 (4 Cir. 1971), we held that a district court was not obliged to request the convening of a three-judge court to pass upon the merits of an attack on the provision of the South Carolina Constitution which conditions the incorporation of a previously unincorporated area on the affirmative vote of a majority of persons eligible to vote (rather than those actually voting), when the Supreme Court of South Carolina had upheld the validity of the constitutional provision in prior litigation, the Supreme Court of the United States had dismissed for want of a federal question and, in a later case decided on the merits, the Supreme Court of the United States decided that a state law requiring more than a simple majority of those voting in an election for passage of a proposal does not offend the constitution. We conclude, however, that even if our decision

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[4] (continued) which plaintiffs seek to raise here. Although entitled to great respect, and perhaps completely persuasive, the decision of a state court of last resort is not binding on a federal court on a federal constitutional question raised by persons who were not parties in the state litigation. The decision was decisive with regard to the plaintiff in the state litigation, and the district court gave it that effect when it dismissed Kisley as a plaintiff in the instant case.

[5] *Dillenburg* and *Doe* were cases which were concerned with summary affirmance rather than summary dismissal by the Supreme Court. If *Dillenburg* is correct in treating summary affirmance without opinion as having very little precedential significance, manifestly,

(continued)

in *Hall* commits us generally to treat summary dismissal for want of a substantial federal question as an adjudication on the merits, we should not treat the Supreme Court's dismissal in *Kisley* as an adjudication on the merits. This is so because an examination of the opinion of the Supreme Court of Virginia and the representations of the parties made to us in their briefs and arguments show that at least some of the federal claims sought to be litigated in the instant case were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court. We therefore think that there was good reason for the Supreme Court to dismiss for want of a substantial federal question on the familiar principle that it will not consider questions neither raised nor considered throughout the litigation, and that this dismissal does not constitute an adjudication of plaintiffs' claims, *inter alia,* that the ordinances are repugnant to Title VII of the Civil Rights Act of 1964. Tacon v. Arizona, ___ U.S. ___(February 21, 1973); Cardinale v. Louisiana, 394 U.S. 437 (1969).

For these reasons, we affirm in No. 73-1131, and direct that the district court proceed with a trial on the merits as soon as practicable. In Nos. 72-2441 and 72-2442, we reverse the orders of dismissal and direct that the district

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[5] (continued) summary dismissal has less. *Doe* treats summary dismissal and summary affirmance of equal binding precedential value.

court conduct further proceedings in accordance with the views expressed herein.[6]

No. 73-1131 AFFIRMED.
Nos. 72-2441 REVERSED
and 72-2442 AND REMANDED

Re: No. 73-1131
Nos. 72-2441/42

ADDENDUM

In accordance with the court's usual practice, the foregoing opinion, before it was filed, was circulated to all members of the court for the concurrences of the panel members and the comments or suggestions of the non-panel members.

Pursuant to Rule 35, F.R.A.P., a member of the court moved for rehearing in banc and requested a poll on his motion. The motion failed to gain the support of a majority of the judges entitled to vote thereon.

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[6] With regard to these cases, we express no view on whether injunctive relief, if it is otherwise indicated, should be denied in No. 72-2441 because only the members of the City Council of the City of Hampton, Virginia, have been joined as defendants. This is a matter for determination by the district court if plaintiffs press their claim for temporary or permanent injunctive relief. It has been represented to us in argument that the City Council of Hampton, Virginia, performs some limited executive function, as well as a legislative function, but even if this is not established, we note that the complaint in this case seeks declaratory as well as injunctive relief. It may be that the request for declaratory relief may be granted, even though it is determined that injunctive relief should be denied for failure to join necessary defendants. In any event, there would appear to be no reason why plaintiffs, upon proper application, should not be granted leave to amend to join other defendants who perform executive functions in Hampton, Virginia.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1131

Gloria Joseph, James Robert Hogge,
t/a Miss Masseuse, t/a BO-JAC, Ltd.;
Doris Green, t/a Spence Enterprises, Inc.,
and Robert Kisley, t/a The Falls Church
Health Center,

Appellees,

v.

Louis H. Blair, Mayor, City of Falls Church,
Va., Lee M. Rhoads, Vice-Mayor, City of
Falls Church, Paul Brockman, James J. Lynch,
Jimmie H. Singleton, Harold L. Miller, Council-
men, Falls Church, Edna A. Clark, Council-
woman, City of Falls Church, Robert F.
Wheeler, Chief of Police, City of Falls Church,
LaRue Van Meter, City Attorney, City of
Falls Church and Harry E. Wells, City Manager,
City of Falls Church,

Appellants.

No. 72-2441

Patricia Hogge,

Appellant,

v.

Members of the City Council, City of Hampton, Virginia: David Montague, Mayor, Ann Kilgore, Tom Waters, Charles Wormon, Henry Martin, Willis Cox, Harry B. Dyche, each in their official capacity,

Appellees.

No. 72-2442

Edwin Emerson,
T/A Peninsula Massage Parlor,
T/A Continental Massage Parlor,

Appellant,

v.

Members of the City Council, City of Newport News, Virginia: J.W. Hornsby, Jr., Mayor, Jessie M. Battley, Aubrey H. Fitzgerald, Donald M. Hyatt, O.J. Brittingham, Jr., William F. Peach and Joseph C. Ritchie, each in their official capacity,

Appellees.

ON PETITION FOR REHEARING

Submitted August 10, 1972 Decided September 27, 1973

Before BOREMAN, Senior Circuit Judge, WINTER, Circuit Judge, and BLAIR, District Judge.

ON PETITION FOR REHEARING

PER CURIAM:

The defendant officials of the Cities of Falls Church, Hampton and Newport News, Virginia, have petitioned for rehearing and have suggested rehearing in banc. The suggestion for rehearing in banc has been submitted to a poll of the judges of the court eligible to vote thereon, and the suggestion has failed to receive a majority vote. It therefore does not carry. The panel unanimously concludes to deny rehearing, and it is so ordered.

Because of the comments of our dissenting brother, we are constrained to make some additional remarks.

There are no proceedings in the Virginia courts, civil or criminal, involving the plaintiffs before us on appeal which, we think, would warrant invoking the *Younger* doctrine, or applying our prior decision in Lynch v. Snepp. Robert Kisley has been prosecuted in the Circuit Court of Fairfax

County and found guilty of a violation of the Falls Church ordinance; but, by stipulation, his sentencing has been postponed pending an adjudication in the instant proceedings of the validity of the ordinance under which he was prosecuted. Robert Kisley also instituted a civil action in the Circuit Court of Fairfax County to have the Falls Church ordinance declared invalid, but he has moved to take a nonsuit under Code of Va., §8-220 (1957 Repl. Vol.), as is his absolute right, although the state court's order of nonsuit has not been formally entered. Thus, the criminal and civil litigation involving Kisley cannot possibly result in a state court adjudication of the issues before us. Additionally, Kisley was dismissed as a plaintiff by the district court on the grounds of *res judicata*, and he has not appealed that ruling. Thus, Kisley is no longer a party to the instant litigation. The suggestion that BO-JAC, Ltd., a plaintiff in No. 73-1131, may have instituted an equity action in the Circuit Court of the City of Hampton, prior to suing in the district court, that that action is still pending and that it may be made a basis for the application of *Younger*, is made first in the petition for rehearing, and we think it comes too late.[1] In any event, BO-JAC is not the only plaintiff in the instant case.

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[1] In the main briefs, counsel now petitioning for rehearing made a passing reference to a state equity case filed by BO-JAC, but there and in argument, the criminal and civil litigation involving Kisley was asserted as the basis for application of *Younger*. Before the district court and before us, counsel did not dispute their adversaries' assertion that the Hampton case had become moot when a preliminary injunction had been denied and that "it was just a question of submitting an order and getting it off the docket. . . ." We will hold counsel to the implicit representations made to us.

While in the ordinary case we would probably stay our decision pending enlightenment from the Supreme Court in Becker v. Thompson, cert. granted,____U.S.____ (February 25, 1973), we are presented with conflicting decisions from a single district within our circuit. The need for uniformity requires us to resolve the conflict now, and we would no less avoid a decision were we to grant the stay suggested by our dissenting brother, albeit his proposed resolution would be more palatable to him.

Supreme Court of the United States

October Term, 1973

No. 72-706

73-978

Supreme Court, U.
FILED
JAN 28 1974
MICHAEL RODAK, JR., C

DAVID MONTAGUE, Mayor of Hampton, Va. et al.

Petitioners

V.

PATRICIA HOGGE,
EARLE PHILLIPS,
T/A Paridise Massage Parlors
BO-JAC, LTD.,
T/A Miss Masseuse

Respondents

J. W. HORNSBY, JR., Mayor of Newport News Va., et al.

Petitioners

V.

EARLE PHILLIPS,
T/A French Massage Parlor
SCARLETT ANNE HILLIARD,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Kenneth C. Hogge
Carmel, Gray & Hogge
United Virginia Bank Building
Hampton, Virginia 23669

Counsel for Respondents

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QUESTIONS PRESENTED

1. Whether summary dismissal for want of a substantial federal question by this Court from a decision by the highest court of a state precludes a determination of constitutionality where different parties are challenging different ordinances and substantial changes in the applicable law have occurred.

2. Whether a federal district court is required to abstain from exercising its jurisdiction in cases in which a local ordinance is being attacked on the grounds it is facially unconstitutional and in direct conflict with the 1964 Civil Rights Act, 42 U.S.C. 2000e, where there is a finding that no criminal prosecutions were pending against the plaintiffs at the time the suit was initiated.

STATEMENT OF FACTS

On March 22, 1972, the City Council of Hampton, Virginia, adopted Chapter 22.1 of the Hampton City Code. That ordinance provided, inter alia, that:

> WHEREAS, upon report of the Division of Police, administrative officers, and inhabitants of the City, such places called "massage parlors", and similar establishments as hereinafter defined are being used, or may be used because of their nature, as houses of prostitution, or places where disorderly, lewd, lascivious and unlawful conduct or exhibitions occur;...

> It shall be unlawful to administer, for hire or reward, to any person of the opposite sex any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business or in connection with his business, any agent, employee or servant or any other person under his control or supervision to administer any such treatment to any person of the opposite sex.

On March 23, 1972, Bo-Jac, Ltd., a corporation which owns and operates Miss Masseuse Massage Parlor, filed a petition in Hampton Circuit Court seeking a temporary injunction (see Appendix, page a2, Transcript of Hearing of July 7, 1972, U. S. Dis. Ct., p. 7), at which time the petition for a temporary injunction was denied and the proceedings stayed until such time as amended pleadings requesting a determination on the merits could be filed. On March 29, 1972, Mr. Justice I'Anson of the Supreme Court of Virginia also denied a request for a temporary injunction. No further pleadings were filed in the Hampton Circuit Court.

On August 24, 1973, the case was dismissed without prejudice by the Circuit Court, no determination on the merits ever having been requested or

adjudicated.[1]

On April 3, 1972, in the United States District Court for the Eastern District of Virginia, Patricia Hogge, Earle Phillips and Bo-Jac, Ltd.[2] sought a temporary restraining order against the enforcement of Chapter 22.1 of the Hampton City Code. The Plaintiffs alleged that Chapter 22.1 violated their rights protected by the Fourteenth Amendment to the United States Constitution and by the 1964 Civil Rights Act, 42 U.S. Ca. A 2000e.

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1. See VA. CODE ANN. §§ 8-220 (1957), Sweeny, Non Suits in Virginia, 52 Va. L. R. 751,758. Petitioners' reliance on Kemper v. Calhoun 111 Va. 693 695 E. 358 (1910) (Petitioners'Brief p. 11 n.2) is misplaced. Sweeny points out " t he Kemper case itself recognizes that the inconvenience and expense of double litigation were not sufficiently prejudicial to the defendant to justify a denial of a non suit".p. 756.

2. Petitioners state that James Hogge was a Plaintiff in this case and the state court proceeding. James Hogge has never been a Plaintiff in either proceeding involving the Hampton ordinances. It should also be pointed out that Patricia Hogge and Earle Phillips were at no time plaintiffs in the state court proceeding.

On April 19, 1972, the District Court entered a Memorandum Order staying further proceedings pending a final disposition of the proceedings involving Bo-Jac in the Hampton Circuit Court. As previously noted, no determination in the merits was sought and the suit was subsequently dismissed without prejudice.

On July 24, 1972, the District Court entered an order dismissing the case on the grounds that the principles of comity expressed in Younger v. Harris 401 U.S. (1971) were equally applicable to cases involving pending and non-pending state criminal prosecutions. Plaintiffs were therefore precluded from seeking declaratory and injunctive relief from the federal district courts.

> As is readily apparent from Younger v. Harris, the appropriate forum foran initial challenge to the constitutionality of a state law is a state court...Plaintiffs have two means of presenting their constitutional claims to federal tribunal....if Plaintiffs pursue their civil action in the state courts and not successful, they may petition the Supreme Court of the United States for a certiorari. In the alternative, Plaintiffs may elect to present their claims as defenses in criminal proceedings, if such are instituted by the City of Hampton; again, Plaintiffs may petition the United

States Supreme Court for certiorari if they are unsuccessful in pursuing their available state remedies.

The Court also expressed the view that it felt bound to abide by the decision of the Supreme Court of Virginia in Kisley v. Falls Church 212 Va. 693, 187 S.E. 2d 168 (1972), app.-dism. U.S. (1972) even though the parties and ordinances were different, since

"the result of entertaining Plaintiffs' claim to a determination on the merits would be to make this a court of appeals from the Supreme Court of Virginia" (Petitioners' Appendix 10a)

An Appeal to the Court of Appeals for the Fourth Circuit was noted on August 23, 1972.

Newport News

On March 27, 1972, the City Council of Newport News, Virginia, adopted Section 21C of the Newport News City Code, which prohibited the operation

of:

> [M]assage Parlors...or any similar type of business...where any physical contact or massage with the recipient of the service provided by a person of the opposite sex.

The ordinance further provided that:

> It shall be unlawful for any employee, individual owner or operator of such establishment or any other type of establishment to give or administer a massage to any member of the opposite sex.

On April 26, 1972, Earle Phillips[3] and Scarlett Hilliard filed a complaint

---

3. Edward Emerson, the owner of a massage parlor joined Phillips and Ms. Hilliard in the original suit. On October , 1973, Emerson withdrew from the suit and therefore is not a party before this Court. Petitioners' contention that a prosecution was pending against Mr. Emerson at the time the suit was initiated is untimely raised in this Court. Whatever validity this contention might have had as to Mr. Emerson had it been timely and properly raised before the District Court or the Court of Appeals is an idle question since the issue has now been mooted.

for declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia, Newport News Division alleging that the ordinance violated their rights protected by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964, 42 U.S.C. 2000e. Respondent Phillips alleged that in his capacity as a massage parlor owner he was placed in the untenable position of being forced to violate either the 1964 Civil Rights Act or the unconstitutional Newport News Ordinance. Ms. Hilliard alleged in the pleadings which were sworn to by affidavit that she had been discharged from the position she held as a masseuse directly and solely as a result of the enactment of Chapter 21C.

At the time the suit was initiated criminal prosecutions had not been initiated against either Mr. Phillips or Ms. Hilliard.

Petitioners' statement of the case notes (Petitioners' Brief p. 8) that Phillips was arrested on April 29, 1972, for violating the massage parlor ordinance. This arrest was subsequent to the Respondents' initiating this suit in Court on April 27, 1972. It should also be pointed out that this factual allegation is being raised for the first time in this Court. Petitioners did not raise the issue of a prosecution against Phillips either in the District Court or the Court of Appeals.

On July 24, 1972, the District Court entered a Memorandum Order dismissing the case stating that since the factual situation was similar to that presented in the Hampton Court the same principles of comity required abstention. The sole distinction made between the two cases was that in Hampton prosecution was threatened but had not already begun while in Newport News actual enforcement had begun, a distinction which appears to go to the standing issue raised by the District Court in the companion Hampton case.

On August 23, 1972, an appeal was noted to the Court of Appeals for the Fourth Circuit where the cases were consolidated for hearing.

The Court of Appeals found that

> [W]hen the various suits were filed in the Eastern District of Virginia no criminal prosecutions against any Plaintiff had begun ....in Hampton, no prosecutions have begun...,in Newport News, prosecutions for violation of the ordinance had been instituted at the time of suit, but the prosecutions were against persons other than the Plaintiffs.

The Court of Appeals held that the District Court had erred in abstaining from exercising its jurisdiction in a non-pending situation.

It expressly adopted the view of Mr. Justice Brennan, stated partially in concurance and partially in dessent, in Perez v. Ledesma 401 U.S. 82, 120 (1970) that the principles of comity expressed in Younger do not require the federal courts to abstain from exercising the jurisdiction when no state criminal prosecutions are pending at the time Plaintiffs seek to initiate federal court proceedings.

ARGUMENT

SUMMARY DISMISSAL BY THIS COURT OF A DECISION BY THE SUPREME COURT OF VIRGINIA INVOLVING A DIFFERENT ORDINANCE AND DIFFERENT PARTIES DID NOT REQUIRE THE DISTRICT COURT IN THIS CASE TO DISMISS RESPONDENT'S COMPLAINT WHERE A SUBSTANTIAL CHANGE IN THE STATE OF THE RELEVENT LAW HAS TAKEN PLACE AND RESPONDENTS HAVE RAISED CONSTITUTIONAL AND STATUATORY ARGUMENTS WHICH WERE NOT PREVIOUSLY BEFORE THIS COURT

The Court of Appeals correctly held that Respondents were not precluded from challenging the validity of different ordinances in a case involving different parties, and different federal statuatory and constitutional grounds because of this Courts dismissal of the appeal in Kisley v. Falls Church supra for want of a substantial federal question.

Petitioners cite a number of cases which they feel support their position

that summary dismissal in any case precludes future challenges to the constitutionality of any similar ordinance regardless of whether different parties, and different issues are involved.

In Dean Hill Country Club v. City of Knoxville 379 F 2d 321,325 (5th Cir. 1967)cert. denied, 389 U.S. 975. the Fifth Circuit held that res judicata precluded the same parties from relitigating the same issues again.

U.S. ex.rel. Epton v. Nenna 446 F 2d 363 (2nd Cir. 1971) cert. den. 404 U.S. 948 (1971) also involved the same parties who had previously petitioned for certiorari.

In Patterson v. City of Newport News 364 F 2d 816 (4 Cir. 1966) appeal dismissed and cert. den., 385 U.S. 360 reh. den. 386 U.S. 969 (1967) the Fourth Circuit held that the same parties were precluded from relitigating the same issues. A decision which was later reaffirmed in the companion case to this suit when the Court held that Robert Kisley was precluded by Kisley v. Falls Church supra from relitigating the constitutionality of the same ordinance he had earlier challenged.

Hall v. Thornton 445 F 2d 834 (4 Cir. 1971) Heany v. Allen 425 F 2d 869, 870 (2 Cir. 1970) and Port Authority Bondholders Protective Comm. v. Port of New York Authority 387 F 2d, 259, 262 (2 cir. 1967) cited by Petitioners would allow subsequent challenges where new

matter has been subsequently decided casting a new light upon the issues.

The Ninth Circuit in Dillenburg v. Kramer 469 F 2d. 1222, 1225 (5 Cir. 1972) has rejected petitioners' broad view of the effect of a summary decision by this Court.

> A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance citing (Frankfurter & Landis, "The Business of the Supreme Court at October Term 1929" (1930) 44 Harv. L. Rev. 1, 14.

If summary affirmance is to be accorded little precedential value summary dismissal should be accorded even less.

The Effect Petitioners seek to give summary dismissals by this court work a substantial injustice upon parties seeking to challenge the validity of statutes which infringe upon their constitutional rights. One suit by one party on any constitutional issue either in state or federal court which was appealed to the Court would preclude all future litigation.

Such a broad interpretation of the effect of summary dismissal particularly unwarranted in view of this Court's policy of refusing to consider federal

questions which were not properly and timely raised in the courts below. Stern and Gressman Supreme Court Practice §3.27 (4th Ed. 1969). Issues which were not properly raised by the first party challenging statute would be forever lost to future litigants challenging similar statutes.

In summary, Petitioners urge upon this Court a concept of stare decisis in the nature of res judicata which would promote substantial injustice.

PETITIONERS SEEK TO RAISE FACTUAL ISSUES BEFORE THIS COURT WHICH WERE NOT RAISED BEFORE THE DISTRICT COURT OF THE COURT OF APPEALS AND THUS ARE REQUESTING THE COURT TO MAKE FINDINGS OR FACT WHICH ARE IN DIRECT CONTRADICTION WITH THE FINDINGS OF FACT OF BOTH LOWER COURTS.

Petitioners request the Court to make factual determinations which are in direct conflict with those of the two courts below. Both the District Court and the Court of Appeals found that there were no pending state criminal prosecutions against any of the Respondents at the time the suits were instituted.

This Court held that:

> "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by

questions which were not properly and timely raised in the courts below. Stern and Gressman Supreme Court Practice §3.27 (4th Ed. 1969). Issues which were not properly raised by the first party challenging statute would be forever lost to future litigants challenging similar statutes.

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This Court held that:

> "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by

two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 339 U.S. 605; Berenyi v. Immigration Director 385, U.S. 630, 635.

WRIGHT,C. FEDERAL COURTS (1970)§ 108 p. 496, Stern & Gressman Supreme Court Practice(1969)§ 4.14.

THE DECISION BY THE COURT OF APPEALS THAT CONSIDERATIONS OF COMITY DO NOT DICTATE ABSTENTION BY THE DISTRICT COURT WHERE NO CRIMINAL PROSECUTIONS WERE PENDING AT THE TIME THE SUITS WERE INSTITUTED IS IN ACCORDANCE WITH THE PREVIOUSLY ANNOUNCED DECISIONS OF THIS COURT.

Petitioners argue that Younger v. Harris supra required the District Court to abstain from hearing petitioners suit for declaratory and injunctive relief when no criminal prosecutions were pending against Respondents at the time the proceedings in federal court were initiated. Nothing in Younger or its companion case, Samuels v. Mackell, 401 U.S. 66 (1971) supports this conclusion. In Younger the Court stated:

We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.

401 U.S. at 41 (emphasis supplied).

Petitioners argue that the proper forum for Respondents to raise their constitutional challenges to a local ordinance statute is in the state court system, therefore, abstention by the District Court was appropriate. This Court squarely rejected that argument in Zwickler v. Koota 389 U.S. 241, 248, 251, (1967) holding:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choise of a federal forum for the hearing and decision of his federal constitutional claims.....[W]e again emphasize that abstention cannot be ordered simply to give the state courts the first opportunity to vindicate the federal claim....We would defeat those purposes of the Civil Rights Act if we held that assertion of federal claim in a federal court must await an attempt to vindicate the same claim in state court."

The Court then dealt with the procedure for determining whether declaratory and injunctive relief were proper holding that the inappropriateness of injunctive relief was not a proper consideration in determining whether declaratory relief should be granted.

The principles expressed in Zwickler were elaborated upon in by Mr. Justice

Brennan, partially concurring and partially dissenting, in Perez v. Ledesma 401 U.S. 82, 92, (1971). After a lengthly discussion of the relevent precedents of this Court and the legislative history of the Declaratory Judgment Act of 1934, Mr. Justice Brennan concluded:

> Where no criminal prosecution involving the federal court parties is pending when federal jurisdiction attackes, declaratory relief determining the disputed constitutional issue will ordinarily be appropriate to carry out the purposes of the Federal Declaratory Judgment Act and to indicate the great protections of the Constitution

at 130.

The Court of Appeals expressly adopted the view of Mr Justice Brennan. It also relied upon the decision of this Court in Lake Carrier's Assoc. v. Mc Mullen 406 U.S. 498 (1972) stating

> The decisions there [Younger and Samuels v. Mackell] were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met.

The decision of the Court of Appeals therefore, is clearly in accordance with the prior announced policies of this Court.

CONCLUSION

Petitioners have failed to assert any valid reason why this Court should grant certiorari. The opinion of the lower court is well reasoned and is in accord with existing legal precedents. The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

Kenneth C. Hogge

Kenneth C. Hogge
Citizens & Marine Bank Bldg.
Hampton, Virginia
Counsel for Respondents

Circuit Court for the City of Hampton, VA***the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and seventy-three.

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

BO-JAC LTD.
T/A Miss Masseuse

Plaintiffs

vs. #10801

CITY OF HAMPTON, VIRGINIA

Defendant

O R D E R

THIS DAY CAME the Attorney for the Plaintiff and requests that this cause be dismissed from the docket of this Court.

AND IT APPEARING that nothing further should be done in this cause, it is hereby ADJUDGED, ORDERED and DECREED that the same be dismissed from the docket of this Court.

ENTER this Order forthwith.

Entered this 24th day of August, 1973.

/s/ Nelson T. Overton, Judge

I ask for this:

/s/ Kenneth C. Hogge

Have Seen: and object to its entry unless same be with prejudice to the Plaintiffs.

/s/ Thomas E. Glascock

COPY TESTE:

C. M. GIBSON, Clerk

By Carolyn G. Gilbert
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

PATRICIA HOGGE,

EARLE PHILLIPS,
T/A Paradise Massage Parlor

BO-JAC, LTD.,
T/A Miss Masseuse,

Plaintiffs

v. CIVIL ACTION
NO.42-72-NN

MEMBERS OF THE CITY COUNCIL,
CITY OF HAMPTON, VIRGINIA:
DAVID MONTAGUE, Mayor, ANN
KILGORE, TOM WATERS, CHARLES
WORNOM, HENRY MARTIN, WILLIS
COX, HARRY B. DYCHE, each in
their official capacity,

Defendants

Proceedings had in the above entitled causes on the 7th day of July, 1972, at 9 a.m., in the United States District Court for the Eastern District of Virginia, Newport News Division, at Norfolk, Virginia, before the Honorable Richard B. Kellam, United States District Judge.

Testimony in reference to the status of the state court proceedings at page 7.

THE COURT: There has been no request to have it set for trial..

MR. GLASCOCK: No, sir.

THE COURT:...or hearing on it?

MR. GLASCOCK: No, sir.

THE COURT: Now, the hearing which was held--that was on application for a temporary injunction?

MR. GLASCOCK: Temporary Injunction; yes.

THE COURT: That was denied?

MR. GLASCOCK: Yes, sir.

THE COURT: So, it just stands at that point?

MR. GLASCOCK: Stands at that point.

FILED
FEB 27 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-978

LOUIS H. BLAIR, Mayor of Falls Church, Virginia
DAVID MONTAGUE, Mayor of Hampton, Virginia
J. W. HORNSBY, JR., Mayor of Newport News, Virginia, etc., et al., *Petitioners,*

v.

GLORIA JOSEPH, JAMES ROBERT HOGGE, t/a/ MISS MASSEUSE, t/a BO-JAC, LTD., etc., et al., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP J. HIRSCHKOP
108 North Columbus Street
Post Office Box 234
Alexandria, Virginia 22313
(703) 836-5555
Attorney for Respondents

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LOUIS H. BLAIR, Mayor of Falls Church, Virginia
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BRIEF FOR RESPONDENTS IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Respondents hereby adopt the Statement of the Case as set forth in the Petition for a Writ of Certiorari, with the exception of the following, appearing in said Statement of the Case.

On Page 6, it is stated that the respondents' federal complaint "realleged the same constitutional infirmities", presumably in reference to the complaint in equity filed by Robert Kisley on November 14, 1972 in the Circuit Court of Fairfax County, Virginia. It is evident that this statement is clearly erroneous and

that it conflicts with the findings of fact of both the District Court decision in Civil Action No. 595-72-R (35a of Appendix to Petition) and the decision of the Court of Appeals (56a of Appendix to Petition).

With regard to the representation on Page 6 that "further proceedings in the state courts have been suspended pending determination" by the Federal Courts, the record reveals that concerning the criminal prosecution in the Circuit Court of Fairfax County, Virginia, a stipulation between counsel, including a counsel for the same parties as the Falls Church petitioners herein, was entered into to defer sentencing pending a decision on the merits by the Federal Courts and that a motion for a non-suit was entered by plaintiff with regard to the equity action. This is finally mentioned in the Petition at Page 12 under *Post Appeal Action.*

ARGUMENT

This case comes before this Court from an interlocutory appeal of the Court of Appeals for the Fourth Circuit. The petitioners fail to state any grounds as to why the immediate intervention of the Court is necessary or warranted and, in fact, the posture of the case in the Courts below is such that adjudication may be had on the merits without any extraordinary inconvenience to any parties of the action.

Moreover, the questions presented in the petition are based on misrepresentations of the opinions of the Court of Appeals.

Furthermore, a careful reading of the petition reveals that this Court is actually being asked to review findings of fact.

I. The Immediate Intervention of This Court Is Not Necessary.

The petitioners fail to give any reason why there is such a question of immediacy that this cause should be heard before adjudication on the merits. None of the plaintiffs in any federal complaints originally heard by the two District Courts are in any different position than they were when the complaints were filed. Respondents refer the Court to the memorandum opinion of the District Court in *Joseph* v. *House,* Civil Action No. 595-72-R (35a) wherein the Court states, "the status quo to be preserved is the non-enforcement of the ordinance." See also Court of Appeals opinion (56a) which affirms this finding. There is no indication in the petition that this situation is working any undue hardship on the City of Falls Church, Virginia.

Similarly, the parties to the complaints filed in the District Court, Civil Action Nos. 42-72-NN and 48-72-NN, are in no different position then when the complaint was filed by virtue of the fact that on remand from the Court of Appeals, the District Court again denied the prayers for injunctive relief.

There is no reason, therefore, to ignore the well recognized proscription against piecemeal review.

II. Petitioners' First Question, That of Whether Summary Affirmance by This Court Is a Decision Involving Merits, Although an Important Question, Is Not Germane to This Case.

A careful reading of the opinion of the Court of Appeals (56a) reveals that this quetsion is truly non-existent. The petitioners indicate that the Court of Appeals' stance on the import of a summary ruling

by this Court was the determining factor in its refusal to treat this Court's dismissal of *Kisley* v. *City of Falls Church, Virginia*, 212 Va. 693, *app. dism.*, —— U.S. ——, 93 S.Ct. 237 (1972) as adjudication on the merits in the federal complaint in Civil Action No. 595-72-R. In fact, the Court stated:

> Even if our decision in *Hall* [v. *Thornton*, 445 F.2d 834 (4 Cir. 1971)] commits us, generally, to treat summary dismissal for want of a substantial federal question as an adjudication on the merits, we should not treat the Supreme Court's dismissal in *Kisely* as an adjudication on the merits. This is so because an examination of the opinion of the Supreme Court of Virginia . . . shows that, at least, some of the federal claims sought to be litigated . . . were either not raised in the Virginia suit, or were not passed upon in any substantial way by the Virginia Supreme Court. (65a)

Petitioners ignore the facts that there are different parties from Kisley raising issues of first impression herein.

As the District Court noted:

> In the absence of an order in the state court allowing a class action, such parties may if jurisdiction be present litigate their alleged controversy in the federal courts, including suits centering about ordinances which previously withstood attacks by other parties. *Carter* v. *City of Fort Worth*, 456 F.2d 572 (5 Cir. 1972); *Jeffreys* v. *Swank*, 337 F. Supp. 1062 (D.C. Ill. 1971). (42a).

Petitioners, further ignoring the fact that Kisley is no longer a party herein, maintain in their petition that this Court considered the merits of this issue in deciding there was "no substantial federal question."

Petitioners must know this to be a misstatement of this Court's action. The Court held that in their refusal to review the matter, *not in ruling on the merits,* that there was want of a substantial federal question. A substantial federal question does not exist when issues are raised in the Supreme Court below or where the Supreme Court below fails to treat such questions and the Supreme Court treats them as not having been raised below. See Stern and Gressman, *Supreme Court Practice,* §§ 3.25-3.32. Thus, Stern and Gressman, quoting from language of the Supreme Court, state in § 3.25 that:

> It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question have been properly raised in the state Court proceedings. . . . A federal issue not meeting these standards is deemed insubstantial and is cause for dismissal of an appeal . . . .

Petitioners are aware that the statutory and constitutional claims advanced in the United States Supreme Court in the prior Kisley appeal had not, indeed, been treated by the Virginia Supreme Court and there is substantial question as to whether they were indeed raised there. Accordingly, the question of the Supremacy Clause, Article VI Section 2 of the Constitution of the United States or the right of privacy under the Ninth Amendment to the Constitution of the United States were never previously raised in the Supreme Court of Virginia or of the United States. Similarly, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 e and the violation because of sex discrimination of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States were not raised by Robert

Kisley's counsel in the Virginia Supreme Court. This is not altered by the disingenuous treatment of the Title VII claim on Page 24, F.N. 4 of the petition.

Finally, the question of preemption by State criminal statutes, embodied in Title 18.1 of the Code of Virginia, of the massage ordinances herein were not raised in the Supreme Court of Virginia, although they were raised in the Supreme Court of the United States for the first time in the prior Kisely petition. These latter points, not previously adjudicated, were the major reasons for the Supreme Courts in California, *Lancaster* v. *Municipal Court,* 100 Cal. Rptr. 609, 6 Cal. 2d 809 (1972) and Washington, *Lacey* v. *J.S.K. Enterprises,* 6 Wash. App. 43, 492 P.2d 600 (1972) and a United States District Court in Texas, *Corey* v. *Dallas* 352 F.Supp. 977 (N.D. Tex. 1972) recently invalidating almost identical ordinances.

It is evident that the disputed matter of law as stated in the petition is a mere question of fact passed upon and decided correctly by the Court of Appeals. The petition states no compelling reason why this Court should ignore the usual rule that a writ of certiorari will not be granted to review evidence and discuss specific facts. *United States* v. *Johnston,* 268 U.S. 220. *National Labor Relations Board* v. *Waterman S.S. Corporation,* 309 U.S. 206 (1940).

III. The Refusal of the Court To Abstain From Consideration of the Federal Complaint Was Based Upon Finding of Fact and Not a Question of Law.

The petitioners contend that th Court of Appeals misapplied the doctrine of *Younger* v. *Harris,* 401 U.S. 36 (1971). In fact, the Court of Appeals' decision affirming the findings of the District Court in

Civil Action No. 595-72-R was based clearly on the finding of a fact situation which placed this case outside the scope of the *Younger* doctrine. Respondents feel that the opinions of both the Court of Appeals and the District Court in Civil Action No. 595-72-R correctly construe the law in terms of the *Younger* doctrine and rely on said well reasoned opinions in lieu of further argument. See also *Pugh* v. *Rainwater*, 483 F.2d 778 (5 Cir. 1973).

CONCLUSION

For these reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

GLORIA JOSEPH,
ROBERT HOGGE
t/a MISS MASSEUSE,
t/a BO JAC, LTD.,
By Counsel

Counsel for Respondents:

PHILIP J. HIRSCHKOP
108 North Columbus Street
Post Office Box 234
Alexandria, Virginia 22313
(703) 836-5555